IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1915.

No. 777.

THOMAS KELLY,
Appellant,

vs.

ELVIN J. GRIFFIN, Jailor of Lake County, Illinois, and JOHN J. BRADLEY United States Marshal,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF OF APPELLANT.

BARNARD & MILLER PRINT, CHICAGO.

SUBJECT INDEX.

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BRIEF OF APPELLANT.

This is an appeal from the final order of the District Court, discharging a writ of *habeas corpus* issued upon petition of appellant, and remanding him to the custody of appellee, Griffin. The petition was filed to procure appellant's discharge from the custody of Griffin, jailer of Lake County, Illinois, to which he stood committed by the warrant of Lewis F. Mason, United States Commissioner, to abide the order of the Secretary of State for his extradition to Canada, to answer certain criminal charges at Winnipeg, in the Province of Manitoba. A writ of *certiorari* also issued requiring the Commissioner to certify the proceedings before him, to which writ return was made.

(NOTE—Unless otherwise stated, figures in brackets refer to pages of the printed transcript of record.)

STATEMENT OF CASE.

I.

AS TO JURISDICTION OF THE PERSON OF APPELLANT.

Appellant was arrested, forcibly and without any warrant or other process, and therefore (as we contend) unlawfully, at the Blackstone Hotel, Chicago, by police officers of the City of Chicago, on Friday, October 1, 1915. He resisted, but yielded to threat of superior force. (239, 242-243.) The arrest was made pursuant to a telegram of that date from one McRae, Commissioner of Police at Winnipeg, Manitoba, to the Chicago Chief of Police, of the following tenor (241):

> "Arrest and hold Thomas Kelly. Charge, obtaining by false pretenses One Million Two Hundred and Fifty Dollars. Warrant issued. Will most likely be pointed out to you. Description, Age about sixty; six ft. one; hair and mustache dark, turning gray; brown eyes. Was a prominent contractor here. Extradition proceedings will follow."

On the same day, after appellant's arrest, the Chief of Detectives of the City of Chicago, sent a telegram to McRae at Winnipeg, of the following tenor (245):

> "Wire name complainant, amount involved, date of crime and all other data for fugitive warrant. Kelly under arrest; is fighting. Wire immediately tonight. Unless information at hand by eight Saturday morning Kelly will be discharged by court. Rush."

Following his arrest, appellant was held in cus-

tody by the Chicago police until next morning (October 2d), and was then by them taken to the office of United States Commissioner Mason (243, 246), and there turned over by them to the United States Marshal. (243, 246-48.)

A complaint was made before the commissioner by one Bernays, British Vice Consul General at Chicago, upon information and belief based upon the telegraphic communications to the Chicago police from the Attorney General and police authorities of the Province of Manitoba, charging Kelly with the crimes in Manitoba of obtaining money under false pretenses; of receiving money, valuable securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained; and of perjury, and alleging that warrants had been issued by the proper authorities of said province therefor, and that he was a fugitive from justice and was then within the United States. (21, 295.) Thereupon a warrant was issued by the commissioner to the marshal. (290, 293.) The custody of appellant (without his being set at liberty) was, there in the commissioner's office, turned over by the Chicago police officers to the marshal. (243, 248.)

The proceedings before the commissioner were adjourned at complainant's instance until October 15, 1915 (296, 311), at which time (appellant being present in the custody of the marshal), an amended or new complaint of Nugent, British Consul General, was filed, and warrant issued and placed in the hands of the marshal, the reading of the new warrant being waived by counsel for appellant, who was already in the marshal's custody; and the former complaint was abandoned and dismissed. (32, 40 to 45.)

Thus it appears from the record,—we say it without the least disrespect and only because we conceive and shall contend it has an important bearing,—that the arrest and detention of Mr. Kelly by Chicago police officers without any warrant or authority of law, so that he might be already in secure (if unlawful) custody when, later, proceedings under the Act of Congress might be taken for his extradition to Winnipeg, for alleged offenses there committed, were instigated and directed by the authorities of Manitoba.

The custody of appellant by the marshal (which was taken from the Chicago police officers on the morning of October 2d), continued without any interval of liberty, until he was, on November 11th, at the conclusion of the hearing before the commissioner, committed to the jailer of Lake County by the United States Commissioner to await extradition.

It was contended on the part of the appellant before the commissioner (240, 267, 268), and before the District Court (15), as ground for his discharge from custody—and is here contended to be ground for reversal—that because his arrest and detention was thus unlawful, the commissioner was without jurisdiction of his person.

II.

AS TO THE COMPLAINT AND CHARGES OF CRIME AND THE EVIDENCE TO SUPPORT THEM.

The complaint of the British Consul General, Nugent (40 to 42), first charges generally that appel-

lant had been guilty of the crimes of (1) perjury; (2) obtaining money by false pretenses; and (3) larceny or embezzlement, and the obtaining of money, knowing the same to have been embezzled, stolen or fraudulently obtained; and proceeds with a more specific statement of the charges as follows:

"Second—That he, the said Thomas Kelly, on or about the 26th day of March, A. D. 1915, at Winnipeg, aforesaid, did unlawfully commit perjury by swearing in a judicial proceeding, to wit: before the Public Accounts Committee of the Legislative Assembly of the Province of Manitoba, in words to the effect that the proportions in which the ingredients were in the concrete in the caissons of the new parliament buildings at Winnipeg in Manitoba, constructed by Thomas Kelly and Sons, were one, two and four, or one and six, one of cement, two of sand and four of broken stone, and that the amount of cement was a little over a barrel and one-half in each cubic yard of concrete in said caissons, such assertion being then and there known to the said Thomas Kelly to be false and being intended by him to mislead the committee, contrary to the statute in such case provided.

Third—That said Thomas Kelly was also then and there guilty of the crime of obtaining money by false pretenses; that between the 16th day of July, 1913, and the 1st day of January, A. D. 1915, at Winnipeg aforesaid, the said Thomas Kelly did unlawfully obtain for the firm of Thomas Kelly and Sons, from the provincial officers of the Province of Manitoba, having the care, custody, control and disbursing of public funds, with intent to defraud

His Majesty the King in the right of the Province of Manitoba in the Dominion of Canada, the sum of, to wit: $1,250,000; that he obtained during the period aforesaid $779,987 of the moneys of the Province of Manitoba on account of the pretended extra work done and materials furnished in construction of caissons for the new parliament buildings at Winnipeg, upon false and fraudulent representations and statements that Thomas Kelly and Sons had put in upwards of 35,000 cubic yards of reinforced concrete, used 1,213,000 feet of lumber, and 797 5/10ths tons of iron rings and bolts, and that the fair and reasonable value for the concrete was $12 per cubic yard, $40 per thousand feet for the lumber, and $140 per ton for the iron rings and bolts, the said Thomas Kelly then and there well knowing the fact to be that he had not put in said caissons to exceed 23,115 cubic yards of concrete, or used to exceed, to wit: 100,000 feet of lumber, or, to wit: 40 tons of iron rings and bolts, and that the fair and reasonable cost and value of said extra work done and materials furnished, including a ten per cent. profit to said contractors, did not then and there exceed $99,292.50; that said moneys, and other moneys, were so obtained by said false pretenses and other false pretenses, with intent to defraud His Majesty the King in the right of the Province of Manitoba, contrary to the laws of the Province of Manitoba in the Dominion of Canada in the domain of His Britannic Majesty.

Fourth—That said Thomas Kelly, between the first day of May, 1913, and the first day of May, 1915, at Winnipeg aforesaid, did steal money, valua-

ble securities or other property belonging to His Majesty the King in the right of the Province of Manitoba, and at the said place and times did also unlawfully receive money, valuable securities or other property belonging to His Majesty the King in the right of the Province of Manitoba which had theretofore been embezzled, stolen or fraudulently obtained by means of an unlawful and fraudulent conspiracy entered into between said Thomas Kelly, Sir Rodmond P. Roblin, then and there premier of the Province of Manitoba, Walter H. Montague, then and there Minister of Public Works, James H. Howden, then and there Attorney General, George R. Coldwell, then and there Acting Minister of Public Works and Minister of Education, R. M. Simpson, Victor W. Horwood, then and there Provincial Architect, and others, to defraud His Majesty the King in the right of the Province of Manitoba out of large sums of money by means of false and fraudulent contracts for extras in the construction by the firm of Thomas Kelly and Sons, of which firm the said Thomas Kelly was a member, of the new parliament buildings at Winnipeg, Manitoba, and by false and fraudulent estimates and statements of the amount and quantity of labor and materials necessary to make the changes desired, and false and fraudulent and exorbitant values for the same, and that by means of such false and fraudulent scheme, of fraud and deception, entered into, participated in and carried out by said parties, said Thomas Kelly and Sons, of which firm the said Thomas Kelly was a member, fraudulently and feloniously obtained of the moneys of the Province of Manitoba, the sum of, to wit: $1,250,000 in fraud of His Majesty the King in

the right of the Province of Manitoba and contrary to the laws of the Province of Manitoba in the Dominion of Canada in the domain of His Britannic Majesty."

Brief Summary of Appellant's Contentions.

Our principal contentions with respect to these charges are:

As to Perjury:

(a) That the offense of perjury charged against appellant is not an extraditable crime; that it is not made criminal by the laws of both countries; that the crime of perjury in Canada, with the commission of which he was charged, is not a crime in Illinois where he was apprehended, nor in the United States under the Acts of Congress.

(b) That the legal evidence preferred before the commissioner did not tend to show the commission of the offense, for that the alleged false testimony was not under the sanction of a lawful oath or affirmation, and did not constitute perjury. The Committee of the Legislative Assembly, before which such alleged testimony was given, was not authorized to administer an oath to the witness or to take such testimony.

With respect to each of the other offenses respectively, viz: obtaining money by False Pretenses, and Larceny, or Embezzlement, and Receiving money, etc., knowing the same to have been theretofore embezzled, stolen or fraudulently obtained,—we contend:

(a) That such alleged offense, as presented in the complaint and proofs, is not made criminal by the laws of both countries, and is not the treaty crime or crimes; and

(b) That the legal or competent evidence be-

fore the commissioner did not tend to show the commission by the appellant of such alleged offense.

FURTHER STATEMENT OF CASE AS TO SAID RESPECTIVE CHARGES AND THE PROOF.

1. *As to Perjury:*

(a) The crime of Perjury, with which the appellant so stands charged, is defined in the Criminal Code of Canada as follows (italics being ours):

"Section 170: Perjury defined—Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, *and whether such evidence is material or not,* such assertion being known to such witness to be false and being intended by him to mislead the court, jury or person holding the proceeding.

2. Judicial proceeding.—Every proceeding is judicial within the meaning of the last preceding section which is held in or under the authority of any court of justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any legislative council, legislative assembly or house of assembly or any committee thereof, *empowered by law to administer an oath,* or before any justice, or any arbitrator or umpire, or any person or body of persons *authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath,* or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether

the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid. 55-56 V., c. 29, s. 145.

Section 174. Punishment of perjury or subornation of perjury.—Every one is guilty of an indictable offense and liable to fourteen years imprisonment who commits perjury or subornation of perjury." (226.)

The contention of appellant is that the crime of perjury under the Canadian code which is charged against him and upon which his extradition is sought (of which the materiality of the evidence is not an ingredient) is not a crime in Illinois where he was apprehended, or in the United States,—in each of which jurisdictions the materiality of the evidence is an essential ingredient of the crime. In other words, the crime of perjury charged is not within the treaty or convention between the United States and Great Britain.

(b) We further contend that there was lacking to the offense here the essential requirement of a lawful oath.

The alleged perjury here charged was for a statement of appellant on March 26, 1915, before the committee of the legislative assembly of Manitoba, known as the committee on public accounts. Of course it was an essential ingredient of the offense which must be shown by the proof, that such statement was made under the sanction of a lawful oath; and having that in mind, and to make such proof as there was of the constitution of that committee and its power with respect to making inquiries and examining witnesses and administering oaths to witnesses,

the complainant offered in evidence a transcript of the Journal of the Legislative Assembly of Manitoba, showing the constitution and appointment of the Select Standing Committees of said House for the second session of the Fourteenth Legislature, commencing February 9, 1915 (among which committees was one "On Public Accounts"), and their powers in the premises. The resolution for their appointment provided as follows (italics being ours):

> "Which said committees shall severally be empowered to examine and inquire into all *such matters and things as may be referred to them by the House*, and to report from time to time their observations and opinions thereon, with power to send for persons, papers and records, and to examine witnesses under oath." (52.)

The complainant also for the same purpose introduced in evidence a certified copy of "The Legislative Assembly Act," being "An Act respecting the Legislature of Manitoba," Section 35 of which prescribes the power of such committees as follows (italics ours):

> "35. Any select committee of the Legislative Assembly, *to which any private bill or other matter or cause has been referred by the House*, may examine witnesses upon oath, upon matters relating to *such* bill, matter or cause, and *for that purpose* the chairman or any member of such committee may administer an oath, in the form in this section contained, to any witness, as follows" (setting forth form of oath). (84.)

The supposed perjury charged consisted of an alleged statement by Mr. Kelly before the Public Accounts Committee, on March 26, 1915, as to the proportions of the ingredients in the concrete in the caissons of the new parliament buildings at Win-

nipeg, under construction by the firm of Thomas Kelly & Sons, contractors therefor. (40, 94.)

There is nothing, however, either in the Legislative proceedings offered in evidence, or otherwise in the proofs presented before the Commissioner, showing or tending to show (as the resolution creating the committee and said Legislative Assembly Act required) any reference by the Legislative Assembly of Manitoba to the Committee on Public Accounts of the subject matter about which Mr. Kelly was speaking or being examined, or upon any bill, matter or cause as to which the alleged testimony of the appellant, which is charged to constitute perjury, was given. So far as the evidence before the Commissioner shows or tends to show, the proceeding and action here in question of the Committee on Public Accounts were taken of its own initiative without any reference to it by or authority from the House. Appellant caused inquiry to be made whether any such reference to the Public Accounts Committee was made by the Legislative Assembly, but learned of none. (9.)

Among the papers offered in evidence on such perjury charge, there was also a copy of an affidavit or deposition of John Allen, that he is a practicing barrister and attorney for said Province in Winnipeg and deputy attorney general for said Province. He states the provisions of said sections 170, 171 and 174 of the Canadian Criminal Code above set forth, and further says:

> "The Public Accounts Committee of the Legislative Assembly of the Province of Manitoba is one of the select standing committees appointed by the Legislative Assembly of the Prov-

> ince of Manitoba to examine and inquire into the public accounts of the Province of Manitoba for the year preceding the appointment of said committee, and also into all matters pertaining to the said public accounts. Section 35 of 'the Legislative Assembly Act' of the Province of Manitoba, being chapter 112 of R. S. M., 1913, empowers the said Public Accounts Committee to examine witnesses on oath. Such a committee as the Public Accounts Committee, aforesaid, forms an important part of the legislative machinery under the British form of government."

Section 35 of the Legislative Assembly Act, to which Mr. Allen refers, was offered in evidence with his deposition, and in plain terms speaks for itself. (*Supra*, p. 11; Print, Rec., 84.) It empowered the committee to examine witnesses upon oath in relation to such private bill, or matter or cause as had been referred to the committee by the house.

Mr. Allen added the following conclusion of fact, which it was the function of the United States commissioner, and not that of the witness, to draw:

> "I have perused the depositions attached hereto, and, in my opinion, the evidence disclosed by the said depositions shows the crime of perjury, aforesaid, under the laws of Canada." (90.)

The above testimony of Mr. Allen was duly objected to on this ground and as incompetent (262-263).

The appellant contends that there was no legal or competent evidence before Commissioner Mason tending to show, or upon which he could exercise his judgment and find the essential ingredient of the crime, viz., that the Committee on Public Accounts was empowered to administer the oath to Mr. Kelly or

that his statement before the committee was made under the sanction of a lawful oath; and that question is here presented.

2. *As to the charge of obtaining money by false pretenses:*

The crime of false pretenses is defined and dealt with in Sections 404, 405, 405a and 406 of the Criminal Code of Canada, which were offered in evidence by the complainant and are as follows (Pr. Trans., 225):

> Section 404.—False Pretenses—Definition: A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.
>
> 2. Exaggerated commendation or depreciation of the quality of anything is not a false pretense, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.
>
> 3. It is a question of fact whether such commendation and depreciation does or does not amount to a fraudulent misrepresentation of fact. 55-56 V., c. 29, s. 358.
>
> Section 405.—Punishment for obtaining by false pretense.—Everyone is guilty of an indictable offense and liable to three years' imprisonment, who, with intent to defraud, by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself. 55-56 V., c. 29, s. 359.
>
> Section 405a.—Obtaining credit by false pre-

tenses.—Everyone is guilty of an indictable offense and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretenses, or by means of fraud. (Added by 7-8 Ed. VII., c. 18, sec. 6.)

Section 406.—Obtaining execution of valuable security by false pretense.—Everyone is guilty of an indictable offense and liable to three years' imprisonment who, with intent to defraud or injure any person by any false pretense, causes or induces any person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix any name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security. 55-56 V., c. 29, s. 360."

The provision of the Illinois statutes defining False Pretenses is as follows:

"Section 96.—Whoever, with intent to cheat and defraud another, disinterestedly by color of any false demand or writing, or by any false pretense, obtains the signature of any person to any writing, instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined in any sum not exceeding $2,000, and imprisoned not exceeding one year, and shall be sentenced to restore the property so fraudulently obtained if it can be restored. No indictment for the obtaining of any property or thing by any false pretense or pretenses shall be quashed, nor shall any person indicted for such offense be acquitted, for the reason that the facts set forth in the indictment, or appearing in evidence, may amount to a larceny or other felony; nor shall it be deemed essential to a conviction, that the property in the goods or things so obtained shall pass with the possession to the person so obtaining it." (Rev. Stat. Ill., Ch. 38, Sec. 96; Hurd's Stat. 824; 1 Jones & Add., Ill. Stat. Ann., pp. 2033-34, par. 3.)

The charge and averments of the complaint before the United States Commissioner appear *supra,* p. . The complaint at Winnipeg appearing at page 116 of the printed record is still more meager and insufficient.

The proof tends to show:

That on July 16, 1913, the firm of Thomas Kelly and Sons, contractors (composed of appellant and three sons, Lawrence C., Charles B. and Robert Emmet Kelly), was awarded and entered into a contract for the construction at Winnipeg of new parliament buildings for the Province of Manitoba, for $2,859,750. (125.) That the specifications on which the bids were asked and the contract was awarded called for pile foundations. (*Ibid.*) That it was decided by the authorities of the Province to construct caisson foundations instead of piling. That the Provincial Architect, who was in charge of the work. and the contractors, agreed on prices for the caisson work. The caisson work commenced the latter part of August, 1913 (118, 122, 126), and appears to have been carried to completion in the spring of 1914. (147, Exch. 12.)

Other changes in the work were made and other contracts were entered into respecting portions of this work,—one of August 26, 1913 (153); one of March 26, 1914 (148); one of May 22, 1914 (154); one of June 20, 1914 (151); and one of December 23, 1914 (128). None of the contracts or specifications were offered in evidence or produced before the United States Commissioner. It appears from the evidence for complainant that the contracts were made on behalf of the King or Province by the Min-

ister of Public Works for the Province of Manitoba. (123, Lyall.) Work under these contracts and under the original contract of July 16, 1913 (other than the caisson foundations), appears to have gone on until the summer of 1915.

Payments by check on account of the caisson work commenced Nov. 29, 1913 (132, Exh. 2; p. 131, Exh. 5; 145, Exh. 7); and from that date until June 23, 1914, there were issued upon vouchers of the Provincial Authorities and given to the firm of Thomas Kelly and Sons, on account of such caisson foundations, checks of the Provincial Treasurer and the Provincial Auditor on the Union Bank of Canada at Winnipeg to the order of said firm, amounting altogether to $779,987 or thereabouts. (129 to 131, 132, 133, 134, 137, 145 to 147.) On account of the other contracts and work other similar checks were given upon similar vouchers. (129 to 154.)

As we understand it, the contention of appellee is that the receipt and collection by the firm of Thomas Kelly and Sons of these checks constituted the supposed "obtaining" by the appellant of the money which is charged to have been obtained by false pretenses.

Preliminary or prior to the payments, so-called applications for payment or "progress estimates" were made from time to time by said firm of Thomas Kelly and Sons to the Provincial Architect. It is understood that these applications or "progress estimates" are relied upon by the appellee as constituting the alleged "false pretenses" on the part of appellant.

Having in mind the elements of the crime of ob-

taining by false pretenses, the material circumstances (other than those above stated), under which these checks were issued by the provincial officers and obtained by the firm of Thomas Kelly and Sons were these:

This work was done by the contractors under the supervision, inspection and observation of the Provincial Architect (Horwood); and inspectors (Elliott, Villeroy and Salt) under the architect were continuously on the work to measure and keep track of the work done and see that the contractors complied with the contract and specifications and the directions of the architect in charge of the work. (118, 122.) So that the facts with respect to the work were all the time known to the Provincial Architect, and he could not have relied on the contractor.

The payments were made, not upon faith of these applications of the firm of Thomas Kelly and Sons, but upon vouchers coming from the Department of Public Works and properly certified by the officers of that department having charge of the expenditure, and then passing to the council (of ministers) and then to the Provincial Auditor and Provincial Treasurer. Such voucher in case of every payment by the architect were submitted to the minister of public works, and thereon "orders in council were passed," upon which the Provincial Auditor and Provincial Treasurer gave the check in payment. (126.) The course of business here was testified to by the Provincial Auditor, Mr. Fearnley, and by the Deputy Provincial Treasurer, Mr. Ptolemy. Mr. Ptolemy testified (italics being ours):

> "In order to obtain money from his majesty the king, it is necessary that there should be a

proper voucher coming from the department authorizing the expenditure and properly certified by the officers of that department having charge of the expenditure, then passing through the hands of the auditor to our department for payment. In the case of payments in respect of the parliament buildings, a proper voucher would be presented to the auditor for the Province, accompanied by, among other things, the certificate of the architect, and without this document payments will not be made. The auditor is Frederick Fearnley. *This practice was followed in every instance of payments being made to Thomas Kelly and Sons in connection with the new parliament buildings.* All cheques are signed by the Provincial Treasurer or by myself and are countersigned by the Provincial Auditor beforehand." (118-119.)

Mr. Fearnley, auditor of the province, testified:

"In order to obtain money from his majesty the king, it is necessary that a proper voucher be presented to the auditor, and in the case of payments in respect to the new parliament buildings that a proper voucher be presented to the auditor for the province accompanied among other things by the certificate of the architect, and without these documents payment will not be made. In respect to each of the payments made to Thomas Kelly and Sons the voucher was accompanied by the certificate of the architect certifying that Thomas Kelly and Sons were entitled to the amount of money set out in said certificate and cheques payable to Thomas Kelly and Sons were thereupon issued for the amount set out in each certificate, which cheques had to be signed by the Provincial Treasurer or his deputy and by the auditor or acting auditor of the province. Now shown to me marked 'Exhibits 1 to 19' are cheques issued to Thomas Kelly and Sons in pursuance of such vouchers and certificates and all of the said cheques have been paid to the said Thomas Kelly and Sons

out of the money belonging to his majesty the king." (124.)

The architect (Horwood) testified that one McTavish, an accountant in his office, made out certificates based upon the applications for payment by Thomas Kelly & Sons, and he, Horwood, signed these certificates on the basis of such applications for payment, and says:

> "I completed the certificates hereinbefore referred to for the minister of public works, and on my certificates orders-in-council were passed upon which there was paid to the said Thomas Kelly & Sons," etc. (126.)

Horwood did not testify that he relied or acted upon the applications for payments made by said firm of Thomas Kelly & Sons as representations of the actual amount of work done, or was deceived thereby, or believed them to be accurate statements. It was the obvious duty of the architect under the contract to rely and act upon his own supervision of the work and the inspection and reports of his inspectors as his proper source of information as to the work. Moreover, the architect (Horwood) further testified that he did not rely on these applications or progress estimates but that after certain interviews with one Dr. Simpson (the president of the Conservative Association of the City of Winnipeg) and with the minister of public works (Caldwell), which took place after the construction of the caissons had been commenced (in August, 1913), and so before any payments were made,—he, the architect, "paid no attention to the caisson estimates,—merely signing what was presented to me in the way

of progress estimates or certificates, such as Exhibits 1 to 6." (181, 266.)

McTavish, the clerk in the architect's office, testified that believing in and acting upon the correctness of these applications, he made out certificates for signature by the provincial architect that the said firm was entitled to be paid the amounts. (125.)

Among the depositions offered by complainant before the commissioner was one of Mr. Allen (to whom reference has been before made), that he had perused the depositions attached, and in his opinion the evidence disclosed thereby "shews the crime of obtaining by false pretenses, aforesaid, under the laws of Canada." (128-129.) The law of Canada upon the question was before the commissioner, and Mr. Allen's statement was objected to as a conclusion of fact upon the evidence,—the duty of drawing which was vested solely in the commissioner; and Mr. Allen's testimony was objected to as incompetent. (262-263.)

It is appellant's contention that the necessary elements of the crime of obtaining money, etc., by false pretenses, whether under the statute of Canada, or under the law of Illinois, are absent here in complaint and in proof to give jurisdiction to the United States Commissioner.

3. *As to the charge or charges of Stealing or Embezzlement, and Receiving money, etc., knowing the same to have been embezzled, stolen or fraudulently obtained.* (41-42):

While the word "embezzlement" appears in the general charge in the beginning of the complaint

before the United States Commissioner (40) the criminal complaint against appellant at Winnipeg does not charge embezzlement. That complaint (161-162) and the averments of the complaint at Chicago (41-42) are confined to charges of stealing money, valuable securities or other property belonging to the King, and of unlawfully receiving money, valuable securities or other property which had theretofore been embezzled, stolen or fraudulently obtained.

The criminal complaint against Mr. Kelly at Winnipeg, on which the warrant for his arrest there was issued charged that between May 1, 1913 and May 12, 1915, at Winnipeg, he "unlawfully stole money, valuable securities or other property belonging to his Majesty the King in the right of the Province of Manitoba, and at the said place and times also unlawfully received money, valuable securities or other property belonging to his Majesty the King or the right of the Province of Manitoba, which had theretofore been embezzled, stolen or fraudulently obtained by means of an unlawful conspiracy by fraudulent means, between Thomas Kelly aforesaid, Sir Rodmond P. Roblin, Walter H. Montague, James H. Howden, George R. Coldwell, R. M. Simpson, Victor W. Horwood and others to the informant unknown, to defraud his Majesty the King in the right of the Province of Manitoba, the said Thomas Kelly, then and there well knowing that said money, valuable securities or other property had theretofore been embezzled, stolen or fraudulently obtained by means of the said unlawful conspiracy, contrary to the form of the statute made and provided." (161-162.)

The averments of the complaint before the United States Commissioner with respect to this third charge appear, *supra*, p. 6-7.

As we understand the case, it is the same acts of the firm of Thomas Kelly & Sons in receiving and collecting the checks of the treasurer of the province, which are above referred to in connection with the charge of obtaining money by false pretenses, that are relied upon by the complainant as constituting the gist or gravamen of this third criminal charge or charges here under consideration.

As to Theft or Stealing:

The offense of theft or stealing is defined in Section 347 of the Criminal Code of Canada, introduced by complainant, as follows (italics ours):

> "Section 347 and Sub-Sections.—Thefts defined.—Theft or stealing is the act of fraudulently *and without color or right taking,* or fraudulently and *without color of right converting* to the use of another person, anything capable of being stolen, with intent," etc. (224.)

So far from these checks being taken or received or converted to the use of said firm "without color of right,"—which is essential to constitute the crime of theft or stealing,—the checks were made and delivered and the payments made to said firm, upon proper vouchers of the provincial officers, as is above set forth in the statement with respect to the charge of false pretenses. (*Supra p.* ; Testimony of Ptolemy p. 164, and Fearnley p. 177.) There was then no evidence to support the charge of theft or stealing.

As to Embezzlement:

There is no provision in the Canadian Criminal Code defining "Embezzlement." There is a provision in Section 359 making it an indictable offense (liable to fourteen years' imprisonment) for a clerk or servant to steal anything belonging to or in possession of his employer; or for a cashier, manager, officer, clerk or servant of any bank to steal any bond or security or money or deposit with such bank; or for an employe of the dominion or any provincial or municipal government to steal anything in his possession by virtue of his employment. (224.) There is in Section 390 (*ibid.*) punishment provided for criminal breach of trust by a trustee of any property for the use of some other person or for any public or charitable purpose. But so far as we are able to see, there is nothing in the evidence produced before the Commissioner or in this record in any way tending to show embezzlement or a violation by appellant of the provisions of Sections 359 or 390.

There was no trust relation on the part of appellant or the firm of Thomas Kelly & Sons to the Province of Manitoba.

With respect to the charge of receiving money, valuable security or other property knowing the same to have been embezzled, stolen and fraudulently obtained:

The Canadian statutes most closely applicable here are Sections 399, 400 and 402 of the Criminal Code, introduced by complainant (225) which are as follows:

> "Section 399.—Receiving property obtained by any indictable offense.—Everyone is guilty

of an indictable offense and liable to 14 years imprisonment who receives or retains in his possession anything obtained by any offense punishable on indictment, or by any acts whereso-ever committed, which, if committed in Canada, would have constituted an offense punishable upon indictment, knowing such thing to have been so obtained.

Section 400.—Receiving stolen property.—Everyone is guilty of an indictable offense and liable to five years' imprisonment who receives or retains in his possession any post letter or post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof is hereby declared to be an indictable offense, knowing the same to have been stolen.

Section 402.—When receiving is complete.—The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or other person, possession of or control over such thing, or aids in concealing or disposing of it."

There is no such offense known to the laws of Illinois as the treaty offense of receiving, etc., here charged, although there is a statute applicable to the receiving of stolen goods.

We maintain that there is no such offense in Illinois where the caption of Mr. Kelly took place.

It is our contention that it is an essential ingredient—the gist—of the extradictable offense of receiving money, valuable security or other property knowing the same to have been embezzled, stolen or fraudulently obtained,—which is mentioned in the Extradition Treaty of July 12, 1889, and for which Mr. Kelly's extradition is sought,—that the money security or property received by the accused should have been theretofore embezzled, stolen or fraudu-

lently obtained by someone other than himself, from whom the money or property was so received by him. Indeed that is made so by the very terms of the complaints against Mr. Kelly in Canada (161-162) and before the United States Commissioner (41), averring that the moneys, etc., so unlawfully received by him had "theretofore been embezzled, stolen or fraudulently obtained." But that ingredient is here entirely lacking in the proof submitted.

In other words, we contend that the supposed offense here for which the United States Commissioner committed the appellant to await extradition, is not said treaty offense for which he was apprehended and subjected to such examination before the Commissioner.

As above stated, the charge here of receiving money, valuable securities or other property which had been embezzled, stolen or fraudulently obtained, so far as the proofs disclose, can only refer to the act of the firm of Thomas Kelly & Sons in receiving from the Province of Manitoba the checks above mentioned on account of such contracts and work thereunder. The proofs here with respect to this charge is of the same payments which have been referred to in connection with the charge of obtaining money by false pretenses. (*Supra*, p. 17; Rec., 164; depo. of Ptolemy; *id.* pp. 177-178, depo. of Fearnley; *id.* pp. 190-219, checks and exhibits.) The same acts and transactions, were offered in evidence as constituting the respective crimes of obtaining by false pretenses, theft or larceny and receiving money, security or property which had been embezzled, stolen or fraudulently obtained. The proof stops with the receipt of the checks by the firm of Thomas Kelly

& Sons, and their payment by the bank on which they were drawn.

There is no evidence in the record which tends to show that these checks, or the proceeds thereof, when they were received by the firm of Thomas Kelly & Sons had been theretofore embezzled, stolen or fraudulently obtained. That hypothesis is disproved.

There is no evidence in the record which tends to show that the appellant personally received those checks, or any or either of them, or the proceeds or any part thereof.

There are other provisions of the Canadian Code (Section 69) making one a party to an offense, who does or commits an act for the purpose of aiding any person to commit the offense; or abets any person in its commission; or counsel's or procures any person to commit the offense; and making each one of several persons a party to every offense committed by any one of them in prosecution of the common purpose, where they all have formed a common intention to prosecute any unlawful purpose and to assist each other therein (223); and (Section 70) making every one a party to the offense who counsels or procures another to be a party to an offense. (223-224.)

The evidence tended to show that on August 28, 1915, criminal complaint was made by one Elliott, Chief of Provincial Police at Winnipeg, before a Police Magistrate, charging that Sir Rodmond P. Roblin, Walter H. Montague, George A. Coldwell and James H. Howden between May 1, 1913 and May 12, 1915, at Winnipeg, did unlawfully and by fraudulent means conspire together, and with

Thomas Kelly, R. M. Simpson, Victor W. Horwood and others to defraud His Majesty the King in the right of the Province of Manitoba. (161.) And that said Roblin, Montague, Coldwell and Howden were committed on or about October 1, 1915, for trial on the charge of conspiracy after a preliminary hearing (160). Section 444 of the Canadian Criminal Code makes it a criminal offense for a person to conspire with any other person to defraud the public or any person. (160.) But that offense is not within the extradition treaty; and Mr. Kelly's extradition is not here sought upon that charge.

It is suggested that the attempt has been made in arraying the evidence for these extradition proceedings to bring the case of alleged conspiracy to defraud which is not extraditable, into the shape or semblance of other offenses which are extraditable and which are here charged.

SPECIFICATIONS OF ERROR.

1. The District Court erred in holding that the United States Commissioner had jurisdiction of the person of the Appellant; and in not holding that said Commissioner was without such jurisdiction and in not discharging appellant therefor.

2. The District Court erred in not holding that the crime of perjury, with the commission of which in the Province of Manitoba in the Dominion of Canada, this appellant was charged before said United States Commissioner, is not the crime of perjury denounced by the laws of Illinois or by the laws of the United States, and in not holding that the same is

not a crime in Illinois or in the United States, and is not the crime of perjury mentioned in the treaty or convention of 1889 between the United States and the Kingdom of Great Britain and Ireland, and is not one of the crimes or offenses specified in any extradition treaty or convention between the United States and Great Britain, and in not holding that the same is not an extraditable crime or offense.

3. The District Court erred in not holding that the supposed crime of unlawfully receiving money, valuable securities and other property, knowing the same to have been embezzled, stolen or fraudulently obtained, with the commission of which in the said Province of Mantoba this appellant was charged before said United States Commissioner is not a crime in the State of Illinois or under the laws of the United States; and in not holding that this appellant was not extraditable for said supposed crime or offense.

4. The District Court erred in not holding that the competent evidence before the said United States Commissioner did not prove or show that the Committee on Public Accounts of the Legislative Assembly of Manitoba, (in testifying or making statements before which Committee, it was charged before the said United States Commissioner that this appellant committed perjury in said Province of Manitoba), had any power to administer an oath to said Thomas Kelly as a witness before such Committee, or that the Chairman or any member of said Committee had any such power to administer an oath.

5. The District Court erred in holding that the

competent evidence before the said United States Commissioner tended to prove or show that the said appellant committed perjury in the said Province of Manitoba, as charged in the said complaint before said Commissioner.

6. The District Court erred in holding that the competent evidence before the said United States Commissioner tended to show that the said appellant committed the crime of obtaining money by false pretenses, as charged against him.

7. The District Court erred in holding that the competent evidence before the said United States Commissioner tended to show that the said appellant committed the crime of stealing or theft, or embezzlement, or obtaining money, valuable securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.

8. The District Court erred in not holding that the said pretended offenses charged against the said appellant before the said United States Commissioner are not made criminal by the laws of both countries within the provision and meaning and contemplation of treaties in that behalf between the United States and Great Britain. As to each of said charges of the commission of crime the appellant says that the District Court erred in not holding that the offense so charged is not made criminal by the laws of both countries within the meaning of said treaties.

9. As to each of said charges of crime against the said appellant, and as to each of the said alleged offenses severally, with the commission of which the appellant was charged before the said United States

Commissioner, the appellant says that the District Court erred in not holding that there was not such evidence of criminality before the said Commissioner as, according to the laws of the place where the said respondent, Thomas Kelly, was confined, to wit: the State of Illinois, would justify his apprehension and commitment for trial of such pretended crime or offense, had such pretended crime or offense been there committed.

BRIEF OF THE ARGUMENT.

I.

The United States Commissioner did not have jurisdiction of the person of appellant.

Appellant's arrest and detention without warrant were unlawful.

U. S. Rev. Stat., Section 5270.
Ex parte Cohen, 8 Can. Cr. Cas. 312.
Re Walter A. Dickey, (No. 1) *Id.* 318.
State v. *Shelton*, 79 N. C. 605, 607-8.
Malcolmson v. *Scott*, 56 Mich. 459.
Scott v. *Eldridge*, 154 Mass. 25.
Harris v. *Louisville etc. Ry.* 35 Fed. 116.
Kurtz v. *Moffitt*, 115 U. S. 487.

He could not lawfully be turned over by the Chicago police officers to, or be lawfuly taken from them by the United States Marshal. He should have been set at liberty from such illegal arrest and detention before he could be lawfully arrested on the commissioner's warrant.

Ex parte Cohen, supra.
Hooper v. *Lane*, 6 H. L. Cas. 443.
Mandeville v. *Guernsey*, 51 Barb. 99.

II.

The enactment by the Parliament of the Dominion of Canada of a statute which gives to a different moral offense, which is not a crime in Illinois

or in the United States or at common law,—the name of a crime mentioned in an Extradition Treaty with Great Britain does not bring such different moral offense within the provisions of the treaty.

Such an enactment however, has been made in the Criminal Code of Canada, and it is under it that the extradition of the petitioner for perjury is sought. (Argument, *post*, pages 47-49.)

III.

By the common law, by the statutes of the United States and by the statutes of Illinois, where the petitioner was seized, a false statement under oath to be "perjury" must be material to the issue pending. Coke 3d Institute 167; Archbold's Cr. Pl. Ev. & Pr., 24th Ed. 1160; *R.* v. *Townsend*, 10 Cox 356; Sec. 225 of the Criminal Code of Illinois; Sec. 125 of the Criminal Code of the United States. (Argument, *post*, page 48.)

By the statutes of Canada "perjury" is a false statement under oath in a judicial proceeding whether said statement is material or not. This makes the offense against the laws of Canada, there denominated "Perjury"—an entirely different thing from the crime of "Perjury" known to the Common law, to the Statutes of Illinois, or to the Statutes of the United States. (Argument, *post*, page 49-50.)

IV.

The extraditable crime named in the Convention of 1889, enlarging the Webster-Ashburton Treaty of 1842, as "Perjury," is the Common Law

crime of "Perjury," the definition of which is the same as that given of "Perjury" in the Statutes of Illinois and of the United States and of the United Kingdom.

Chapter 6 of 1 & 2, George V.
Criminal Code of Illinois, Sec. 225.
Criminal Code of U. S., Sec. 125.
Argument, *post*, pages 47 to 52.

By indirection in 1869 and directly in 1892 and again in 1906, the Dominion Parliament denominated as "Perjury" a moral dereliction which was not and is not a crime at common law, nor by the statutes either of Great Britain or of the United States or of any of them.

This did not affect the meaning of the term "Perjury" as used in the Convention of 1889.

Statutes of Canada) 1869, Chapter 23 of 32-33 V.
) 1886, Chapter 154, Sec. 5.
) 1892, Chapter 29—55 & 56 V.
) 1906, Chapter 146, Sec. 170.

Argument, *post*, pages 52 to 56.

V.

Not only must an offense be named in the treaty as extraditable, it must also be considered a crime in both the demanding and surrendering country.

Wright v. *Henkel*, 190 U. S. 58.

This the offense denominated "Perjury" in Canada is not. In the United States it is not a crime. (Argument, *post*, page 57.)

VI.

It is not an answer to our position that the Commissioner or court in the United States might have considered the false statement probably material to the matter under investigation by the Canadian Committee.

If extradited for "Perjury" the petitioner may be tried and condemned in Canada without proof or in the face of disproof of that which constitutes "Perjury" in the United States. It is impossible to extradite for "Perjury" from the United States to Canada and avoid this situation. Extradition from the United States to Canada for this alleged crime is therefore not permissible.

United States v. *Rauscher*, 119 U. S. 407.

(Argument, *post* pages 57 to 63.)

VII.

The alleged false statement of appellant on which the charge of perjury is based was not under oath.

The Public Accounts Committee was without power or authority to examine him under oath, with respect to the matter testified about.

The tribunal must have had jurisdiction of the cause in which the oath was administered, and this committee lacked that jurisdiction.

People v. *Pankey*, 1 Scam. 80.

Maynard v. *People*, 135 Ill. 416.

Hereford v. *People*, 197 Ill. 222.

VIII.

The complaints and the competent evidence before the Commissioner did not show probable cause that appellant was guilty of the crime of obtaining money by false pretenses—(1) under the law of Canada; and (23) under the law of Illinois.

Crim. Code of Canada, Sec. 404; R. S. Ill., Ch. 38, Section B 16, *post*, p. 67.

Jackson v. *People*, 122 Ill. 139, 149.

Moore v. *People*, 190 *id.* 333, 335.

IX.

The complaints and the competent evidence before the Commissioner did not show probable cause of the commission by appellant of the crime of embezzlement, or larceny or receiving of money, valuable securities or other property. Knowing the same to have been embezzled, stolen or fraudulently obtained.

ARGUMENT.

We recognize it as settled that "if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the treaty, and the magistrate has before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purposes of extradition, his decision cannot be reviewed on *habeas corpus.*" (*McNamara* v. *Henkle,* 226 U. S. 520, 522, and cases cited. The questions to which we shall invite the court's attention are as we conceive all open for review under this rule, they are:

1. Did the United States Commissioner here have jurisdiction of the accused?

2. Were the respective offenses charged within the treaty?

3. Did the Commissioner have before him sufficient legal and competent evidence on which to exercise his judgment that the facts in evidence established the guilt of the accused the respective offenses charged?

In *habeas corpus* cases, where the treaty rights and obligations of the United States are involved, the court hearing the application will carefully inquire into any matter involving the legality of the detention and remand or discharge as the facts may require.

Henry v. *Henkle,* 235 U. S. 219, 228.

Where there is no provision of statute making an offense of the acts charged, the committing magistrate has no jurisdiction and the petitioner is entitled to his discharge.

Henry v. *Henkel*, 235 U. S. 219, 230.

I.

THE UNITED STATES COMMISSIONER DID NOT HAVE JURISDICTION OF THE PERSON OF THE APPELLANT.

The forcible arrest of Mr. Kelly, without warrant, and his detention, by police officers of Chicago upon telegraphic instructions from the Manitoban authorities, (*supra*, p. 2) were unlawful.

Ex parte Cohen, 8 Canadian Cr. Cas. 312.
Re Walter A. Dickey, Id. 318.
State v. *Shelton*, 79 N. C. 605, 607-8.
Malcolmson v. *Scott*, 56 Mich. 459.
Scott v. *Eldridge*, 154 Mass. 25.

It was not charged or supposed that Mr. Kelly had committed any violation of the laws of Illinois, for which he was thus arrested by Illinois officers. The arrest without warrant in Chicago was on account of some supposed violation of the criminal laws of Canada. But for this arrest there was not a shadow of authority. The sole authority for arresting in Illinois, a person charged with the commission of crime within the jurisdiction of a foreign government, is found in Section 5270 of the Revised Statutes of the United States, viz, upon a warrant issued upon a complaint made under oath before the United States Commissioner or other authorized judge or officer, as there prescribed. There is no

authority to arrest in any such case without such a warrant.

The Canadian authorities' call to the Chicago police was for his arrest and detention, not *per legem terrae*, but without the required warrant or complaint, because their telegram declared that "extradition proceedings will follow." (241.) The complaint made by the British Vice-Consul General before Commissioner Mason on October 2nd, when Mr. Kelly was brought there by the Chicago police officers who arrested him, was made upon his information and belief, based as he averred upon telegraphic communications from the Attorney General and police authorities of the Province of Manitoba, to the local authorities requesting the arrest of said Thomas Kelly. (295-296.)

The point of this is that the Canadian Government authorities who are seeking the extradition, were directly responsible for the unlawful arrest and are taking advantage of their own wrong.

The Chicago police officers, therefore, were not acting under any supposed authority of law in arresting and detaining the appellant or in taking him to the United States Commissioner's office and turning him over to the marshal, but as the agents of the demanding (Canadian or Manitoban) government or of its authorities who instigated such arrest and who are seeking his extradition. (Rec., 241, 243; *Supra*, p. .....) As well might the Manitoban Police Commissioner, McRae, himself have made the arrest and detention of appellant in Chicago, as have caused the Chicago police so to make it. The demanding government is here taking or seeking to take advantage of its own wrong.

The only lawful thing for the Chicago police officers to do with Mr. Kelly while they had him in custody was to set him at liberty, and not detain him or take him while in custody to the office of Commissioner Mason. *Hooper* v. *Lane*, 6 H. L. Cas. 443, at p. 549-551, per Lord Chancellor Cranworth. The Canadian prosecuting authorties were in no better position. The police officers taking him to Commissioner Mason's court was "just the same as bringing him into the Municipal Court" said officer O'Brien (247). They did not there set him at liberty any more than if they had brought and were holding him in the Municipal Court of Chicago upon a charge of local crime. They took him there so that as soon as the representative of the demanding government should make the complaint and the Commissioner's warrant should issue, they could, as they did, turn him over there to the United States Marshal. (243.) We say with entire respect that this was the method of caption for the extradition proceedings conceived and directed from Winnipeg, and carried out in accordance with the telegraphic instructions, from the prosecuting authorities of the demanding government. At no time after his arrest by the police on October 1st, was Mr. Kelly at liberty.

We maintain that the United States Commissioner or marshal, got no lawful jurisdiction of the person of appellant, and could not acquire jurisdiction by the unlawful action of the Chicago police in bringing him there, nor until he was first fully set at liberty, nor unless and until he should (while so at liberty and entirely free from the constraint of such

unlawful arrest), be arrested afresh by the marshal upon a valid warrant of the Commissioner.

Ex parte Cohen, 8 Canadian, Cr. Cas. 312.
Re Dickey, (No. 1) *Id.* 318.
Hooper v. *Lane,* 6 H. L. Cas. 443.
Mandaville v. *Guernsey,* 51 Barb. 99.
State v. *Shelton,* 79 N. C. 605, 607-8.
Malcolmson v. *Scott,* 56 Mich. 459.
Harris v. *Louisville, &c. Ry.,* 35 Fed. 116.

The case of *Ex parte Cohen, supra,* is closely in point. There the prisoner had been arrested in Montreal without warrant, at the request by telegram of New York police authorities; and thereupon complaint was laid before an extradition commissioner and warrant issued and formal service by the proper officer upon the accused, and he was taken into custody under the warrant of the extradition commissioner. He thereupon sued out *habeas corpus* and was discharged on the ground that his arrest on such telegram and without warrant and his detention were unlawful.

In the leading case of *Hooper* v. *Lane, supra,* Lane brought an action on the case against Hooper, Sheriff, for failing to execute a writ of *ca. sa.* for 323d, 35, 4d against one Bacon. After defendant received plaintiff's writ of *ca. sa.* but before he had executed it, he received a writ of *capias ad respondendum* issued at the suit of one Arambura against Bacon, and arrested Bacon on that writ. The writ of *capias ad res.,* was a nullity for want of some required signature or stamp which had been omitted by inadvertence, and Bacon sued for his discharge from the arrest thereon and he was ordered to be

discharged by Coltman, J. The sheriff then claimed to hold and detain Bacon on the Lane writ of *ca sa.* Bacon sued for discharge therefrom and he was ordered discharged by the same judge. The question of the sheriff's liability to Lane turned upon the question whether the sheriff, having arrested Bacon on a void writ of *capias ad res.*,—could hold and detain him upon Lane's valid wirt of *ca sa.* The negative of this latter question was held by Lord Denman, who gave judgment for plaintiff. This was affirmed by the Court of Exchequer Chamber, and by the House of Lords. In the House of Lords, opinions in support of the judgment rendered were given by Justices Crowder, Williams, Creswell and Coleridge and the Lord Chancellor Lord Cranworth, and *contra* by Barons Bramwell and Martin and Justices Erle and Wightman.

The case turned upon fundamental questions of protecting the right of personal liberty and due process, and, we submit, applies here. It was not disputed by counsel for the plaintiffs in error in that case that the rule of decision would be correct in a case where the plaintiff in the valid writ was guilty of any wrong in the matter of the unlawful arrest such as causing the arrest without any writ, and he was taking advantage of his own wrong (p. 449, citing *Barlow* v. *Hall*, 2 Anstr. 461, and other cases), but contended that it was not applicable where the plaintiff in the writ or sheriff was not guilty of any wrong, as was the case there. And the positions of the judges whose judgments were in favor of reversal upon the question whether Bacon was in the lawful custody of the sheriff under the Lane writ when he was ordered discharged by Justice Coltman, viz:

(Bramwell, B., p. 459; Martin, B., pp. 491-492, 494-495; Erle, J., pp. 503-505; Wightman, J., pp. 526-527) were controlled or affected by the consideration that the plaintiff there was not in any fault and was entitled to the benefit of the arrest and that the sheriff was guilty of no wrong, and should not suffer from the erroneous order of Justice Coltman discharging the prisoner from detention under the Lane writ. "It would," said Mr. Justice Crowder (p. 477), "be a strange anomaly, and at variance with every principle of law, if a trespass which subjects the sheriff to an action for wrongfully depriving a man of his liberty, could enure as a lawful arrest or detainer for any purpose whatever."

The main question for decision was whether Bacon's detention by the sheriff on Lane's writ (which was in his hands) after his discharge on the void writ of Arambura, on which he had been unlawfully arrested, was lawful or unlawful. In holding that such detention was unlawful in a much more extreme case than this, where the unlawful arrest was brought about by no intentional wrong of the sheriff and without any action of the plaintiff, the court applies principles which apply *propriore vigore* to this case; and which as applied here would be in harmony with the views and judgment of minority judges in that great case.

Here the Canadian authorities having in charge the matter of appellant's extradition (and prosecution if he should be extradited) originated and directed his unlawful arrest and incarceration in Chicago of which illegal action they have since been and are seeking to get the advantage. They strenuously opposed and prevented bail. (297 to 299, 303-4.)

These unlawful methods were all unnecessary and uncalled for, because, as they well knew, appellant had been in Minnesota (where he had a summer home), openly and without any concealment for three months, and while there his counsel repeatedly offered the Canadian authorities to appear and respond to extradition proceedings as soon as they should be ready to proceed in Minnesota. (301-2.) It suited their purpose better, however, not to take such action in Minnesota where he could readily be found and would appear, but to trail him by detectives, and when he came to Chicago for a day to meet one of his counsel, one of such detectives speedily informed the Chicago police and pointed him out to the Chicago police officers (241-242), and he was unlawfully arrested and held by them pursuant to the directions from Winnipeg. So, we maintain, the authorities from Manitoba have caused this arrest in violation of law for and in aid of these extradition proceedings, and are here seeking to get the fruits of it in defeating this appeal and securing such extradition.

One fundamental principle of the law of personal liberty will be found running through the views of the judges who expressed themselves in *Hooper* v. *Lane*, and the other cases there cited, and that is they who are responsible for an illegal arrest can take no advantage of it, direct or indirect.

It is submitted that the case and question here are unlike the cases which are likely to be cited for appellee, and which are cited and relied upon by the Commissioner in his able opinion (277 to 279)—cases where the accused was brought within the jurisdiction of the state, whose criminal laws he had violated, from another state, by the unlawful use of force,

which would render the captor liable civilly or criminally (*e. g.*, the *Ker case,* 119 U. S. 437, and the *Pettibone case,* 203 U. S. 192). In such cases it has been held in those and other cases cited, that the fact of his wrongful abduction does not prevent his trial in the state in which he committed an offense. A similar case would be here presented if Mr. Kelly had been forcibly and unlawfully taken from the United States to Canada and was put upon his trial there and urged in defense in the Canadian court his unlawful caption and abduction. No right of his under the laws of Canada would have been violated by his wrongful arrest in a foreign state, and the unlawful act would not have been the act of the Canadian government. In the *Ker case* in the Supreme Court of Illinois (110 Ill. 627, at p. 637) that court was careful to point out that the State of Illinois, which was prosecuting him, had no part in or responsibility for Ker's forcible abduction from Peru to the United States.

But here, Mr. Kelly was in the United States and had been in Minnesota (where he had a summer home) for about three months, as was well known to the authorities of Manitoba. (298 to 301.) He was within and entitled to the protection of the Fourth, Fifth and Fourteenth Amendments.

Yick Wo v. *Hopkins,* 118 U. S. 356, 369.
Wong Wing v. *U. S.,* 163 U. S. 238, 243.

This court, in the *Pettibone case,* stated the principle of the decision in those cases, speaking of the *Ker case,* (203 U. S. 208):

> "The principle upon which the judgment rested was that when a criminal is brought or is in fact within the jurisdiction and custody of a

> state, charged with crime against its laws, the state may, *so far as the Constitution and laws of the United States are concerned,* proceed against him for that crime, and need not inquire as to the particular methods employed to bring him into the state."

And this court in those cases pointed out the distinction which exists between those cases and this case. Speaking in the *Ker case,* in which the point was raised on his trial under an indictment, this court said, and it is quoted by the court in the *Pettibone case,* 203 U. S. 208:

> "The case does not stand, when the party is in court, and required to plead to an indictment, as it would have stood upon a writ of *habeas corpus* in California, or in states through which he was carried in the progress of the extradition, to test the authority by which he was held."

The appellant, Mr. Kelly, has sued out the writ of *habeas corpus* while he is still in this jurisdiction in which the process of law had been abused to deprive him of his liberty.

II.

AS TO THE PERJURY CHARGE.

1. The crime charged is not the treaty crime of perjury.

We have been detailed and precise in the preceding statement that it may be clear that Thomas Kelly has been ordered extradited to Canada on a proceeding in which he is charged with "Perjury" under the laws of Canada,—this alleged "Perjury" having been committed in Canada. It is not material that he is also charged with other crimes.

If the charge of perjury included in the mittimus and warrant through and by which he is held and extradited is wrongfully there,—the prisoner would not be benefited were his innocence of the other two charges against him made clear to a jury in Manitoba.

Therefore irrespective of his rights or his liability to extradition on these other charges if they had not been joined in the proceedings and in its final outcome with this accusation of perjury, he should be discharged on this writ if the extradition for which he was committed by the commissioner cannot be sustained for the crime of perjury.

The punishment of "Perjury" as defined by the laws of Canada, is fourteen years' imprisonment in a penitentiary. If the appellant petitioner is extradited to Canada on the warrant, now, it is to be presumed, actually issued by the Secretary of State, it is to be tried there for the offense of "perjury"—as that offense is defined by Canadian law. If found guilty he may be confined in the penitentiary for fourteen years. And he may be found guilty without the proof or accusation even that he is guilty of that which, as we contend, is an essential constituent of the crime of "Perjury" contemplated and described in the Treaties with Great Britain under which this extradition is sought.

If the word "Perjury" as used in the Treaty with Great Britain under which this extradition is demanded, means one dereliction from righteous conduct, the Dominion of Canada gains no right under that Treaty to secure the extradition of one of its citizens for another and different moral obliquity, by enacting that in the criminal jurisprudence of Cana-

da the word "Perjury" shall mean such other and different immoral act.

This proposition is axiomatic and self-proving. To deny it is to repudiate the fundamental basis of the law of contracts as well as that of all international law.

We contend that such an enactment concerning the meaning of the word "Perjury" is exactly what the Dominion of Canada has made in Section 170 of Chapter 146 of the Revised Statutes of Canada of 1906. "Perjury" by the common law and by the Statutes of Illinois and of the United States has a certain precise definition and description. By the Common Law as laid down in Coke's 3d Institute 167, and in numberless Crown cases (such for example as *R.* v. *Townsend*, 10 Cox 356), it is

> "The taking wilfully of a false oath by any person who being lawfully sworn and required to depose or speak the truth in any judicial proceeding or trial, swears absolutely *in a matter material to the issue then pending.*" (Italics ours.)

By the Statutes of Illinois where Kelly was seized for extradition, in Sec. 225 of the Criminal Code of Illinois—(An Act to revise the law in relation to Criminal Jurisprudence, approved March 27, 1874), "Perjury" is thus defined:

> "Every person having taken a lawful oath or made affirmation in any judicial proceeding or in any other matter where by law an oath or affirmation is required, who shall swear or affirm wilfully, corruptly and falsely *in a matter material to the issue or point in question*, or shall suborn any other person to swear or affirm, as aforesaid, shall be deemed guilty of perjury or subornation of perjury (as the case may be)

and shall be imprisoned in the penitentiary not less than one year nor more than fourteen years." (Italics ours.)

Section 125 of the Act of he Congress of the United States of March 4, 1909, revising the Penal Laws of the United States, is as follows:

"Whoever, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed is true shall wilfully and contrary to such oath state or subscribe *any material matter* which he does not believe to be true, is guilty of *perjury* and shall be fined not more than two thousand dollars and imprisoned not more than five years." (Italics ours.)

By the Common Law therefore, by the Statutes of Illinois, and by the Statutes of the United States, it is a complete defense to the crime charged as "Perjury" that the false statement under oath was not on a point material to the issue or matter pending before the body or person to whom the statement is made.

By the Statute of Canada (Sec. 170 of the Criminal Code of Canada of 1906, Printed Rec., 226):

"Perjury is an assertion as to a matter of fact, opinion, belief or knowledge made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether said evidence is given in open court or by affidavit or otherwise, *and whether said evidence is material or not,* such assertion being known to said witness to be false and being intended by him to mislead the court, jury, or person holding the proceeding." (Italics ours.)

To establish a charge of "Perjury" in Canada, therefore, proof that the false assertion was material to the issue involved is not necessary, nor would proof that it was not so material be a defense.

This makes the offense against the laws of Canada, there denominated the crime of "Perjury," a totally different thing from the Crime of Perjury known to the Common Law and defined by the Statutes of Illinois and of the United States. Elaboration cannot render this clearer. An illustration or two may be suggested, however. Ethically all lying is wrong and injurious to society. If Canada choosing to recognize this in her statutes should decree that hereafter "Perjury" under her laws should be "a false assertion in a matter of fact, opinion, belief or knowledge whether or not upon oath or affirmation" would the ethical offense thus made a felony by the laws of Canada, be the crime of "Perjury" mentioned in the Treaty between Great Britain and the United States?

Calling two different things by the same name does not make them the same, and the omission of *any* essential element of the crime described in the Treaty makes a different thing of the resulting action as certainly as a chemical compound becomes something else when one constituent is abstracted.

Let us consider further what was described by the word "Perjury" in the Treaty with Great Britain under which this extradition is demanded.

It is the Webster-Ashburton Treaty so called of 1842, a part of Article X of which treaty is as follows:

"Article X. It is agreed that the United

> States and Her Britannic Majesty shall, upon mutual requisitions by them or their Ministers, Officers, or authorities respectively made, deliver up to justice all persons who being charged with the crime of murder or assault with intent to commit murder or piracy or arson, or robbery, or forgery or the utterance of forged paper committed within the jurisdiction of either shall seek an asylum or shall be found within the territories of the other."

By a subsequent convention of 1889-1890 the provisions of this Tenth Article of the Treaty of 1842 were made applicable to certain other crimes than those mentioned in the Treaty of 1842. Among these other crimes are

> "5. *Perjury or Subornation of Perjury.*"

Another crime to which the Treaty of 1842 was extended was "Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company."—But because "Fraud" was not a term of precision in the criminal law, and some frauds carried no criminal liability,—there were added to this mention of "Fraud," etc., the words "made criminal by the laws of both countries." No such phrase was added to the words "Perjury or Subornation of Perjury" because no such phrase was necessary. As the Solicitor General of the United States said in his Argument in *Wright* v. *Henkel*, 190 U. S. 40, p. 55, (a suggestion practically adopted by the court in its opinion, p. 60):

> "The United States and England denote with especial accuracy the scope of the various major offenses. * * * No phrase was needed in the Treaty of 1889 to explain the crimes of murder, burglary, etc., nor to express the necessity of criminality in both countries. They *are* criminal in both countries without that."

The "etc." in this quotation peculiarly includes "Perjury." No phrase was needed in the Treaty of 1889 to explain the crime of "Perjury" nor to express the necessity of criminality in both countries. It *is* criminal in both countries. But the "Perjury" which is and was criminal in both countries was "Perjury" at the common law—not the present Canadian brand.

As late as 1911, the Parliament of the United Kingdom passed "An Act to consolidate and simplify the Law relating to Perjury and Kindred Offenses." (1 & 2 Geo. V, Chap. 6.) It did not adopt the enlarged and variant definition of Perjury which the Dominion Parliament had chosen to give to it,—first by implication merely and in ambiguous form in 1869, and then expressly in 1892, but retained the precise, fixed, universally known common law description of it.

Says that Act of British Parliament of 1911:

> "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes *a statement material in that proceeding* which he knows to be false or does not believe to be true he shall be guilty of perjury."

This but restated the law as it had existed in England since criminal jurisprudence came into existence there.

It is true that in 1869 the Dominion Parliament of Canada passed an Act (Chapter 23 of 32 & 33 Victoria) the Preamble of which is:

> "WHEREAS it is expedient to assimilate, amend and consolidate the Statute law respecting perjury in force in the several provinces of Quebec, Ontario, Nova Scotia and New Brunswick and

to extend the same as so consolidated to all Canada"—

and Section 7 of which is:

> "All evidence and proof whatever, whether given or made orally or by or in any affidavit, affirmation, declaration, examination or deposition *shall be deemed and be taken to be material with respect to the liability of any person to be proceeded against and punished for wilful and corrupt perjury or subornation of perjury.*"

This was undoubtedly the introduction into Colonial British jurisprudence of the novelty of a new crime,—more expressly defined by the Criminal Code of Canada under the name of "Perjury," three years *after* the Treaty of 1889 between Great Britain and the United States hereinbefore mentioned was negotiated. This Section 7 was re-enacted or incorporated in the Perjury Act of the Revised Statutes of Canada (1886), Chapter 154, Sec. 5, but in 1892, the Criminal Law of Canada was codified and then by Section 145 of Chapter 29, 55 and 56 Victoria, Perjury was first expressly defined to be

> "An assertion as a matter of fact, opinion, belief or knowledge made by a witness in a judicial proceeding as part of his evidence upon oath or affirmation whether such evidence is given in open court or by affidavit or otherwise *and whether such evidence is material or not,* such assertion being known to such witness to be false and being intended by him to mislead the court, jury or person holding the proceeding."

This Section of the Criminal Code of 1892 was carried forward in identical words into the Revised Criminal Code of 1906, hereinbefore quoted.

By these enactments by indirection in 1869 and

directly in 1892 the Dominion Parliament made a crime of that which had been before in Canada as it had been and now is in all other parts of the British Empire, domestic and colonial so far as we can discover, no crime, but at worst a moral dereliction only.

And to that new crime the Dominion Parliament gave the name of the well known crime of "Perjury."

But to suppose that Great Britain in 1889 intended to include this new crime then only by indirection as we have said, defined, by the use of a term describing the common law crime which at the seat of its government and throughout its colonial possessions elsewhere was alone known by that term, is to repudiate all the ordinary rules of the construction for contracts, great or small. If Great Britain had intended thus to extend the recognized meaning of the legal term "Perjury" she would have so indicated by additional phrasing. As the Treaty of 1889 qualifies "Piracy" by the addition of the words, "By the law of nations" and "Fraud by a bailee," etc., by the addition of the words, "made criminal by the laws of both countries,"—so it would have qualified "Perjury" by the words "at common law" or "as thus defined, etc."—making clear in one way or the other exactly what was meant, if it had not been intended, supposed, and assumed that the word "Perjury" would be given its common law time-recognized meaning.

Thus far our attention has only been directed to the meaning which Great Britain must be presumed to have placed on the word "Perjury" in making the convention. But the minds of the contracting parties must have met on the agreement. We must

assume they did meet, when the meeting point was the definition of an offense known to the common law and the statutes of both peoples for centuries. Can there be any doubt what the consentient construction of the term "Perjury" in the Treaty was? The Statutes of the United States, the Statutes of all the different States of the United States (see e. g. note to Eng. & Am. Ency. of Law, 2d Edition, Vol. 22, p. 686), the Common Law as it existed in Great Britain and in the Colonies on this side the water which became the United States, the Statutes of Great Britain after the criminal law as to false swearing was there codified or made statutory, the Statutes of the British dependencies with the exception of Canada (if the Statute of 1869 can be said to have made an exception), combining to give a certain meaning to the term, is it reasonable to suppose any other meaning was attributed to it by the United States in making the compact?

It was dealing directly with the government of a great central power with both self-governing colonies and Crown dependencies in all parts of the world. A single word is selected as the description of an extraditable crime. Is it not plain that the word must have been used in the sense and with the connotation it bore in the central power on the one hand and in the United States on the other, irrespective of the fact that one self-governing colony might have applied the term to a different act?

The Convention of 1889, then, made extraditable the offense known as Perjury in Great Britain itself and in the United States. No moral dereliction not made extraditable by the Treaties can be made

the basis of extradition proceedings because a colonial Parliament has seen fit to give it that name.

The means of carrying into effect the provisions of the Treaties,—the means which were invoked in the case at bar, are found in Section 5270 of the Revised Statutes of the United States. That section provides that the charge before the Commissioner, Judge or Justice, which authorizes an arrest of the person sought is to be of the commission of a *crime provided for by a treaty or convention* and the evidence which justifies a warrant for surrender must be sufficient to sustain the charge *under the provisions of the treaty or convention.*

Not only must the *Treaty* provide for extradition for the alleged crime,—in this case "*Perjury*" (not "Perjury as defined by the Dominion Parliament" but Perjury at Common Law and by the Statutes of Great Britain and of the United States collectively and individually), but there is an additional safeguard thrown by the law over the liberty of the stranger within the gates of a foreign country.

The crime for which extradition is to be made must be, whatever the language of the extradition treaties, considered a crime by both parties, that is, by the demanding and by the surrendering country. This, Mr. Chief Justice FULLER, voicing the unanimous opinion of this court in *Wright* v. *Henkel,* 190 U. S. 40, p. 58, declares in express words (italics beings ours):

> "The *general* principle of international law is that in *all* cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and as to the offense charged in this case"—(*i. e.,* Fraud by a director of a Company) "the treaty

> of 1889 embodies that principle in terms. The offense must be 'made criminal by the laws of both countries.'"

This clinches and confirms our position taken concerning the meaning of the Treaty.

Whatever could by any stretch of construction be said concerning the meaning which the Governments of Great Britain and of the United States or either of them, or either of their representatives placed on the word "Perjury" in the Extradition Treaty of 1889, because of the existence of the Canadian Statutes, no claim can possibly be made that the United States or the State of Illinois, nor indeed any one of the states which constitute the United States, considers a *crime* the making a false statement under oath—unless that statement is material to the matter under investigation by the tribunal or body to whom the statement is made. An ethical or moral delinquency it may be. It undoubtedly is if "intended to mislead." But it is not a *crime* nor is it punishable under the laws of the United States or of the several states. Therefore it is not an extraditable offense.

It is no sufficient answer to our argument that this rendered unjustifiable the action of the Commissioner and should have caused the release of the petitioner on the *habeas corpus* proceedings in the case at bar,—to say that the Commissioner and the District Court might well have believed that the false statements complained of, *was* material to the matter under inquiry by the Committee of Public Accounts, etc., and therefore constituted "Perjury" not only under the laws of Canada but under those of England and of the United States and of Illinois. This

is the only answer made, however, and the only one possible. But it is not sound. The question is not whether on the mere preliminary and practically *ex parte* examination before the Commissioner of the United States, he thinks that there is *probable cause* for believing Kelly guilty of what would be perjury under our law, but whether he is to be extradited to stand trial on a charge in which he may be found guilty and sentenced to fourteen years' imprisonment,—without any proof at all and indeed with absolute disproof of that which is necessary to render him guilty of the offense named in the Treaty and in the warrant of extradition. That is precisely the situation which confronts Mr. Kelly if he is extradited. He may be possessed of and may offer irrefragable evidence of the immateriality of the false statements he is alleged to have made before the Committee on Accounts to the matter under investigation by it. The jury and judge may be convinced by it,—but his conviction for "Perjury" as defined by the Criminal Code of Canada may follow. If he is extradited it will be in order that he may be tried for the particular crime of perjury which is defined in the Canadian Statute, and which is not a crime in Illinois or in the United States. Such extradition is not within the treaty. It is quite inconceivable that because a man is extradited from the United States, the Courts of Canada in a trial for "Perjury" under their law, will or can compel proof to hold him guilty, additional to that which they would require had he never left Canada for the United States.

And thus, though trying him for an offense with the same name, the courts of Canada would be try-

ing him for a different offense from that for which he was extradited. Such a violation of the treaty is for this court to prevent by preventing the extradition.

For although such action is universally regarded as an unjustifiable violation of treaty obligations, it has by no means been universally held by the courts of Great Britain, Canada, or of the United States that the accused could derive any benefit from this fact —once that the surrendering government had been induced to give him up. This court did indeed so hold in 1886, in *United States* v. *Rauscher,* 119 U. S. 407. Mr. Justice Miller in that case delivered the opinion, able, exhaustive and convincing, and as we shall attempt to point out not without bearing on the case at bar. But this opinion itself furnished sufficient evidence that many courts of both countries and especially of Great Britain, regard the moral obligations of the treaties in this respect as matters for the executive departments of the Governments only to consider,—holding as The Chief Justice WAITE asserts in his dissenting opinion, that

> "If either country should use its privileges under the treaty to obtain a surrender of a fugitive on the pretense of trying him for an offense for which extradition could be claimed, so as to try him for one which it could not, it might furnish just cause of complaint on the part of the country *which had been deceived,* but it would be a matter entirely for adjustment between the two countries and which could in no way enure to the benefit of the accused *except through the instrumentality of the government that had been induced to give him up.*"

In the case at bar it could not be said that the United States had been "deceived" or "induced,"

(if "induced" conveys any idea of false pretense) to give up Mr. Kelly. On the contrary on the representation made by the demanding government that the "Perjury" for which they wish to try the accused in Canada was the offense denominated "Perjury" in Canada, and was a different offense from the "Perjury" defined by the Common Law and the law of the United States, the United States would have deliberately given him up for such trial. He would naturally and properly, therefore, be tried only for "Perjury as defined in the Canadian Code"—although the Commissioner or the courts had been actuated in the order for the surrender by their *prima facie* or *ex parte* assumption of the existence of an essential element in the crime which would never come to a legal or judicial test anywhere. This cannot be the law of extradition. In the Rauscher case, *supra,* this court held that a man surrendered by Great Britain to the United States on a charge of murder would not be tried in this country on the charge of inflicting a cruel and unusual punishment on one of the crew of a vessel of which he was an officer, *although that punishment consisted of the identical acts proved in the extradition proceedings on the charge of murder.*

We do not contend that this case is on all fours with the one at bar, but there are remarks in Mr. Justice MILLER's opinion which may well be considered as very pertinent herein:

> "It can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this unless a case was made of

some specific offense of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitations, implied or otherwise, upon its prosecution of the party. In exercising its discretion it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty and person, while it would not be willing to do this on account of minor misdemeanors. * * * Indeed the enumeration of offenses in most of these treaties and especially in the treaty now under consideration is so specific and marked by such a clear line in regard to the magnitude and importance of those offenses that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others."

If the surrendering country would not be willing to extradite a person on account of the insignificance or unimportance of the crime charged, would it be more willing to do so when the person might be convicted and punished without proof that anything considered a crime at all in the surrendering country had been perpetrated?

Again Mr. Justice MILLER says (italics ours):

"As this right of transfer, the right to demand it,—*the obligation to grant it*, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty and ascertained by the proceedings under which the party is extradited without an implication of fraud upon the right of the party extradited and *of bad faith to the country which permitted his extradition.* No such view of solemn public

> treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them. * * *"

There is something more than an implication in this language that in the case at bar, it would be bad faith in this country to permit extradition of Kelly when it is certain that he not only might but certainly *would* be tried and perhaps convicted and imprisoned for an action not criminal in the United States.

Finally in the *Rauscher* case, Mr. Justice MILLER says (italics ours):

> "If the party could be convicted on an indictment for inflicting cruel and unusual punishment where the grand jury would not have found an indictment for murder, the treaty could always be evaded by making a demand on account of the higher offense defined in the treaty and then only seeking a trial and conviction for the minor offense not found in the treaty. *We do not think the circumstance that the same evidence might be sufficient to convict for the minor offense which was produced before the committing magistrate to support the graver charge justifies this departure from the principles of the Treaty.*"

We see no escape from the conclusion that unless and until the Dominion of Canada changes her Criminal Code on the subject of Perjury and makes Perjury in Canada the crime known as Perjury in the United States and in the United Kingdom, or the United States changes its laws on the subject, no extradition from the United States to Canada under any treaty can be made for "Perjury" alleged to have been committed in Canada.

It is not necessary to consider the complement or obverse of the same question—whether there can be

properly be extradition from Canada to the United States for the alleged offense of "Perjury."

Without discussion it may be suggested, however, that absolute reciprocity is by no means necessary to just action under the Treaties.

If a man is extradited from the United States to Canada for "Perjury" he may be tried and convicted and punished there for what is no crime here, but if he is extradited from Canada to the United States, he can only be convicted and punished for that which is a crime and would render him punishable there.

We respectfully submit that for the reasons we have given the petitioner should have been discharged on the hearing of the writ of *habeas corpus*.

2. THE ALLEGED FALSE STATEMENT OF APPELLANT ON WHICH PERJURY IS CHARGED WAS NOT MADE UNDER A LAWFUL OATH.

The Public Accounts Committee was without power or authority to examine him on oath with respect to the matter testified about. Its entire power in that respect was conferred and limited by Section 35 of the Legislative Assembly Act and the resolution of the Legislative Assembly constituting and providing for its standing committees.

The Legislative Assembly Act, Section 35, introduced in evidence by complainant provides (Rec., 84-85):

> 35. Any select committee of the Legislative Assembly to which any private bill or other matter or cause has been referred by the House, may examine witnesses upon oath, upon matters relating to such bill, matter or cause, and for that purpose the chairman or any member of

such committee may administer an oath, in the form in this section contained, to any witness, as follows:

Form of oath:

The evidence you shall give to this committee touching (*the case to be mentioned here*) and which has been referred to this committee, shall be the truth, the whole truth and nothing but the truth. So help you God. R. S. M., c. 96, s. 38.

Resolution of the Legislative Assembly of February 9, 1915, under which the committee in question was appointed, provides (52):

Resolved, That the Select Standing Committees of this House for the present Session be appointed for the following purposes:

* * * *

V. On Public Accounts:

Which said committees shall severally be empowered to examine and inquire into all such matters and things as may be referred to them by the House, and to report from time to time their observations and opinions thereon, with power to send for persons, papers and records, and to examine witnesses under oath.

The Public Accounts Committee had no power to examine appellant on oath unless the matter about which he was examined had been referred to that committee by the House.

Nothing appears in the proceedings of the Legislative Assembly (which were introduced before the Commissioner by defendant) showing any reference of the matter here in question to the Committee on Public Accounts. (50-77.) The deposition of Mr. Allen does not show any such fact. (89-90.) Nor was it shown by any other evidence.

It is settled that in order that false testimony should constitute perjury, the tribunal must have

had jurisdiction of the cause in which the oath was administered. *Pankey* v. *People*, 2 Scam. 80; *Maynard* v. *People*, 135 Ill. 416; *Hereford* v. *People*, 197 Ill. 222. That jurisdiction, under the evidence here, must be held to be lacking in that Committee.

Wherefore we contend there was no proof before the Commissioner tending to show that appellant was guilty of the crime of perjury.

III.

AS TO THE CHARGE OF OBTAINING MONEY BY FALSE PRETENSES.

Extradition may only be made under the treaty and laws upon such evidence of criminality as, according to the laws of the place where the person charged shall be found, would justify his apprehension and commitment for trial if the offense had been there committed.

We maintain that the complaint and the legal and competent evidence before the United States Commissioner respectively, did not warrant his holding and committing appellant for extradition.

The charge is that appellant between July 16, 1913, and January 1, 1915, did unlawfully obtain for the firm of Thomas Kelly & Sons, from the provincial officers of the Province of Manitoba, having the care, custody, control and disbursing of public funds, with intent to defraud his Majesty the King, in the right of said Province, the sum of $1,250,000. But this is immediately limited by the specific averment that he obtained $779,987 of the moneys of said province on account of pretended extra work done

and materials furnished in construction of caisson foundations for the new Parliament buildings at Winnipeg, upon false and fraudulent representations and statements that said firm put in and used certain respective amounts of reinforced concrete, lumber, and iron rings and bolts, and that the fair and reasonable values for said respective materials and for work were certain sums, the said Kelly then and there well knowing that he furnished only a smaller amount of less value, and that said moneys and other moneys were so obtained by said false pretenses and other false pretenses, with intent to defraud the King "in the right of the Province of Manitoba." (40-41.)

According to the evidence introduced, the supposed "representations" consisted of six contractors' "estimates,"—Exhibits 7 to 12 inclusive (145 to 147) to the deposition of McTavish, a clerk or "accountant" in the office of the Provincial Architect, and a witness (124-125), which he calls applications for payment which were made by Thomas Kelly & Sons for work done, and delivered to the architect. McTavish testifies that some of the applications were handed him by the Provincial Architect and the others by Lawrence C. Kelly (a son and partner of appellant), and that they were generally accompanied by a letter from said firm asking for payment, and that most of the letters were signed by Lawrence Kelly on behalf of the firm. (125.) None of the letters are produced. The Provincial Architect made certificates addressed to the Minister of Public Works each to the effect that Thomas Kelly & Sons were entitled to a payment of the sum of money therein stated (129-131); and on such certificates of

the architect, "orders in council" were passed upon which the payments were made to the firm of Thomas Kelly & Sons. (126.)

The Criminal Code of Canada, 1915, Section 404, defines false pretenses as follows:

> "A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation." (225.)

The Illinois Criminal Code (2 Jones & Add. Ill. Stat. Ann., page 2033, paragraph 3653; Hurd's Rev. Stat., Ch. 38, Sec. 96), provides:

> "Whoever, with intent to cheat or defraud another designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined," etc.

We contend that no case of obtaining money by false pretenses under either the Canadian law or the Illinois law is here presented.

Obviously the submission of such an "estimate" by a firm of contractors for the construction of a government building to the government architect, under whose charge and supervision and eyes, and to whose satisfaction the work was to be done, and whose inspectors were continuously on the work, was not done with the intent "to induce the person to whom it is made to act upon such representation" as to the amount and quality and price of the work referred to therein,—within the meaning of the Canadian statute.

We maintain that the essential quality of the crime of false pretenses in Illinois and at the common law is a deceiving and overreaching by false token or writing or pretense, which is quite lacking in and quite different from anything that any evidence here tends to show appellant or the firm of Thomas Kelly & Sons did. The distinction is obvious in the cases.

Here the evidence at most tends to show that the firm of Thomas Kelly & Sons, contractors, submitted to the Provincial Architect "estimates" with a view to receive payments on the work which estimates were greatly in excess of the amount or value of the work which at the time had been actually done. All of this was done while the contractors were still at work on the parliament buildings and the aggregate payments received, amounted to very much less than would be coming to them under the contracts for the work when completed. And so far as shown and presumably, these contractors (accepted for work of such magnitude) were financially responsible for its completion and for all of their obligations and liabilities, growing out of it. The work was done openly and publicly, under public and official supervision and inspection. The work was so going on for nearly two years. These contractors' estimates were delivered to the Architect so in charge of the work. None of them, so far as the evidence shows, were intended by the firm or by the contract for or went to the Minister of Public Works, or council or to any official other than the architect. The testimony of the Provincial Treasurer and the Provincial Auditor was that in every instance of these payments the necessary practice was followed that there should be a proper voucher coming from the defend-

ant authorizing the expenditure and properly certified by the officers of that department having charge of the expenditure, then passing through the auditor to the treasurer for payment. (118-119, 124.) The parties here, so far as inspecting, measuring and approving or rejecting the work and estimating and paying for it were concerned, were at arms' length. The governmental authorities having this in charge provided for and had their own adequate means of information.

It is submitted that there could have been no expectation or intent on the part of the firm of Thomas Kelly & Sons, that the architect or any one else would rely on, and there is no evidence that he did rely on these estimates as representations.

But to constitute this crime, the representation must be relied on, and must be reasonably calculated to deceive and must deceive.

Clark & Marshall, Crimes, 819.
Com. v. *Strain,* 10 Metc. 521, 522.
Simmons v. *People,* 187 Ill. 327, 330, 331.

All of that was lacking here.

In the case of *Jackson* v. *People,* 126 Ill. 139, 149, the Supreme Court adopts the definition of Bishop that "a false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made, to part with something of value. (2 Bishop in Criminal Law 415.)" False pretenses are so defined in Bouvier's Law Dictionary. It must be such as to impose on a person of ordinary strength of mind. *Id.*

The definition contained in the Criminal Code of

Canada and that adopted by our Supreme Court in the Jackson case, differ in but one respect. Under the Jackson case the false pretense must be "adapted to induce the person to whom it is made, to part with something of value." We find no such requirement in the Canadian Code. Belief of the person defrauded in the truth of the representation is necessary in Illinois. *Moore* v. *People,* 190 Ill. 333, 335. The false pretenses must have had such influence that without their weight the owner would not have parted with his property. *Cowen* v. *People,* 14 Ill. 348, 350; *Comm.* v. *Drew,* 19 Pick. 183. It must deceive the person to whom it is made. Therefore it must be relied on by him and be a direct and proximate cause of his parting with his property. *Clark* v. *Marshall,* Crimes, p. 819. And in determining the criminality of the false pretenses used, it is necessary to consider the ability or incapacity and opportunity of the person to whom they were addressed to detect the falsehood. *Cowen* v. *People,* 14 Ill. 348, 350-351. All of these elements are here lacking.

The distinction between the supposed dereliction or offense for which the Canadian authorities are here seeking to secure and (if he is extradited) to try the appellant, and the crime of obtaining money by false pretenses under the Illinois law is illustrated by the cases which indicate the nature of the frauds that the Legislature of Illinois was undertaking to punish under the name of false pretenses. *Owen* v. *The People,* 14 Ill. 348, was selling a watch for a gold watch, worth $125, when it was galvanized and worth only $5. *Thomson* v. *The People,* 24 Ill. 60, involved getting a farm out of a weak-minded man for teaching him "eye and ear surgery" and taking him into

partnership, although the person pretending to do it had no knowledge of surgery or any such business as he pretended and did not intend to form a partnership. *Thomas* v. *People,* 113 Ill. 531, was an indictment for "conspiring to obtain goods by false pretenses." The accused got a grocery stock from a woman by pretending to convey to her lots to which they had no title. *Jackson* v. *The People,* 126 Ill. 139, involved a horse trade made by one of those fellows who put an advertisement in the paper that they have in a stable in the rear of a first-class house, a first-class horse which is to be sold only because the owner is going to Europe, etc., etc., and then palm off a doctored wind-broken, balky horse with the heaves. *Moore* v. *The People,* 190 Ill. 331, involved obtaining a loan on cattle which the accused represented that he owned but did not own. *People* v. *Weil* was an indictment for practicing "the confidence game"—a pretended bet on a horse race, as was *People* v. *Goodbent,* 248 Ill. 373.

It will be seen that these cases all involve a different *sort* of offense from that of which appellant is accused.

The sum of it is, the alleged offense to which the Canadian prosecutors have here given the name of obtaining money by false pretenses is shown by the complaint and evidence not to be anything of the kind. It is not the crime of that name mentioned in the treaty or in Illinois or at the common law.

The thought, of course, is not to be entertained that in an extradition case, treaty provisions might be strained so that a transaction or dereliction, even if illegal or criminal, which is not a treaty offense should be held to be within the treaty.

IV.

AS TO THE REMAINING OFFENSES CHARGED, OF STEALING LARCENY OR EMBEZZLEMENT, AND OF RECEIVING MONEYS, VALUABLE SECURITIES AND OTHER PROPERTY WHICH HAD THERETOFORE BEEN EMBEZZLED, STOLEN OR FRAUDULENTLY OBTAINED.

The complaints are insufficient. While so much fullness or particularity is not required as in indictments, the complaint must by its averments of fact show the elements of the crime. We maintain that is not the case here with the Canadian (161-162) or with the Chicago complaint. (41-42.)

The evidence does not tend to show stealing or theft under the definition in either country or at common law. In Canada there must be a taking "without color of right" of something capable of being stolen. (224.) In Illinois larceny is the feloniously stealing, taking and carrying away the personal goods of another.

Rev. Stat. Ill., Ch. 38, Sec. 167.

There was here averred or shown nothing like embezzlement. (*Supra*, pp. 21,22.)

The fact is that the complainant here confined his averments in his complaint to the last charge of receiving money, valuable securities or other property which had theretofore been embezzled, stolen or fraudulently received. This charge is phrased substantially as in the treaty. The nearest approach to this in the Canadian Criminal Code in the provisions introduced by complainant is found in Sections 399 and 400. (225.) Section 399 makes it an offense

for one to receive or retain in his possession anything obtained by any offense punishable or indictable, or by any acts wheresoever committed, which, if committed in Canada, would have constituted an offense punishable or indicted, knowing such thing to have been so obtained. (225.) Section 400 makes it an offense for a person to receive or retain in his possession anything, the stealing whereof is thereby declared to be an indictable offense, knowing the same to have been stolen. (225.) The Illinois statute provides as follows:

> "Every person, who, for his own gain or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, shall be imprisoned," etc. (R. S. Ill., Ch. 38, Sec. 239.)

None of these provisions are shown to be violated by the evidence here.

But the averment of the complaint here that the "money, valuable securities or other property" alleged to have been unlawfully received by the appellant "had theretofore been embezzled, stolen or fraudulently obtained," is of the gist of the alleged offense. It will be observed of this essential ingredient of the crime.

(1) That the complaint does not aver or state (as it needs most in order to be sufficient) by whom such money, securities or property had been embezzled, stolen or fraudulently obtained, or from whom appellant received them; and (2) that the evidence does not tend to show that any such money or securities or other property was either received by this appel-

lant or had been theretofore embezzled, stolen or fraudulently obtained by anybody. This was an essential ingredient by the very terms of the charge.

It will be observed that the concluding averment of this Chicago complaint (41-42)—it was not in the Winnipeg complaint (161-162)—that by means of such false and fraudulent scheme, etc., the firm of Thomas Kelly & Sons fraudulently and feloniously obtained $1,250,000 of the moneys of the Province of Manitoba contrary to the laws of the Province, etc., makes no averment of crime against the appellant.

We maintain that no case was made for appellant's extradition for these alleged offenses.

V.

We submit in conclusion that the United States Commissioner was without jurisdiction of the person of appellant, and that no case was presented before him as to any or either of said charges of jurisdiction to commit the appellant for extradition.

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EDWARD OSGOOD BROWN,
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For Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 777

THOMAS KELLY, *Appellant.*

vs.

ELVIN J. GRIFFIN, Jailer of Lake County, Illinois, and JOHN J. BRADLEY, United States Marshal for the Northern District of Illinois, Eastern Division, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable K. M. Landis, Judge Presiding.

BRIEF AND ARGUMENT FOR APPELLEES.

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CHAMPLIN LAW PRINTING CO.

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STATUTES QUOTED.

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STATEMENT.

The crimes for which Thomas Kelly is sought to be extradited in this proceeding grow out of dealings between the said Thomas Kelly and the Government of the Province of Manitoba regarding the construction of the new parliament buildings of that province.

During the year 1912 the Government of the Province of Manitoba decided to erect new parliament buildings in the City of Winnipeg, according to plans furnished by Frank W. Simon, architect (Rec. 167). On the 26th of May, 1913, advertisement was made

for bids for the erection of said buildings according to the plans and specifications, these bids to be in by twelve o'clock noon of the 2nd day of July, 1913 (Rec. 179). The plans and specifications upon which bids were asked provided for a foundation of concrete piling and a superstructure of reinforced concrete. Two bids were put in, one by Peter Lyall & Sons, for $2,863,000, and the other by Thomas Kelly & Sons, for $3,200,000 which was withdrawn and on July 3rd another bid substituted for $2,859,750 (Rec. 179), and a contract was entered into with Thomas Kelly & Sons on July 16, 1913, for the erection of the buildings for $2,859,750 (Rec. 179). That contract was collusive. There was collusion between Thomas Kelly and Sir Rodmond Roblin, premier, and G. R. Coldwell, then acting minister of public works of the Province of Manitoba.

Prior to advertising for bids the officials had decided to change the concrete pile foundations to caissons (Rec. 168). This contemplated change was known by Kelly before he submitted his bid (Rec. 179), and with that change in view, Kelly had included an item in his bid of $64,050 for the piling foundation called for in the original specifications (Rec. 179), although it is estimated that the value of a foundation constructed according to the original specifications would be $196,154.32 (Rec. 189).

It appears also that Lyall & Sons' bid for $2,863,000 was within the time stipulated in the advertisement; that for some reason an order was made by the premier extending the time for receiving bids until the next day; that Kelly took away the bid which he had produced for $3,200,000 and

the next day put in a bid for $2,859,750, thus showing that information had been communicated to him regarding the Lyall bid (testimony of Priestman, Rec. 171; Dancer, Rec. 164; Horwood, Rec. 179; Bowman, Rec. 189; Salt, Rec. 175).

Having decided previous to asking for bids to change the foundations from concrete piling to caissons, as soon as the original contract was executed in July, 1913, Kelly was permitted to start work upon the caissons without any agreement or contract or understanding other than with the architect, Horwood, that he would present bills at the rate of $12 per cubic yard for reinforced concrete, and $7 per cubic yard for excavating, $40 per thousand feet for the lumber used, and 7c per pound for the iron rings and bolts (Rec. 180).

Those prices were excessive. Kelly presented bills on the basis of those prices (McTavish Exhibits 7, 8, 9, 10, 11 and 12, Rec. 102 to 105), for 35,993 cubic yards of reinforced concrete, the same amount for excavation, also for 1,213,000 feet of lumber used, and 797.5 tons of iron caisson rings and bolts, upon which statement he received $779,987 exclusive of the $64,050 included in his original contract for concrete piling (testimony of Fearnley, Rec. 177; and Fearnley Exhibits 2, 4, 5, 6, 7 and 17, Rec. 192, 193 and 195).

Russell, an architect, investigated these caissons put in by Kelly, and based upon that investigation, he calculated that the total cubic yards of material in the caissons was 21,327, making a liberal allowance to the contractors therein (Rec. 173).

The concrete was *not reinforced;* there was no uniformity in the quantities of the different materials used; *no crushed stone* was found in any of the samples taken from the caissons, and in none of the caissons were any lumber or iron rings found, except in the bottom of one and the top of another; (Rec. 174) that the value of the caissons at an outside figure was $228,198.90, after allowing a reasonable profit to the contractor (Rec. 174). The lumber and iron rings used in the construction of the caissons were taken out when the caissons were completed, and used over and over again. Not more than 100,000 feet of lumber at an outside figure was used in the construction of the caissons, and not more than 40 tons of iron rings were used, and not more than one ton of iron rings was left in the caissons. There were 369 caissons in all (Rec. 174, 175).

The evidence shows that prior to the 1st of March, 1914, when the caissons had been completed, only 23,834 barrels of cement had been received by Thomas Kelly & Sons on the work (Rec. 173), and cement was used in other work than for the caissons. If it had been all used in the caissons at a barrel a yard, there could not have been more than 23,834 cubic yards; at a barrel and a half per yard, as required by the specifications there could not have been more than 15,890 cubic yards.

Paul Schioler, a civil engineer, estimates the value of the foundations if constructed according to the original plans, at $196,154.32, and the value of a conservatively and properly designed caisson foundation at $149,730, and that the change from piles to

caissons should have been made at a saving to the province of $46,424.32 (Rec. 189). The $779,987 was therefore all obtained by Kelly with the assistance of his criminal associates by fraud and false pretenses, without the province having received any value therefor. Other changes were also made in the plans and specifications, and contracts for large sums for *extras* entered into on account of such changes, which the evidence in this record shows were unnecessary and fraudulent and resulted in the firm of Thomas Kelly & Sons receiving large sums of public money without rendering value therefor.

On March 26, 1914, a contract was made for the sum of $230,100 for the supposed *extra* expense of changing the superstructure of the north wing from reinforced concrete to a steel construction. On account of that contract Thomas Kelly & Sons received the sum of $195,585 cash, being the contract price less 15 per cent, on the assumption that the contract had been completed and performed in full, and that there were no deductions to which the government was entitled (McTavish Exhibits 13, 14, 15, Rec. 212, 213 and 214; Priestman's Exhibits 8, 16 and 19, Rec. 192, 195 and 196; testimony of Priestman, Rec. 172; Fearnley, Rec. 177).

The work had not been done, and the material had not been erected as represented (Rec. 183). No deduction was made on account of the cost of the work as originally planned, and none intended (Rec. 183, 158).

It appears also from the evidence in the record that Kelly only paid $67,000 for the steel used in this

contract, and $1.50 per ton for painting it; that a fair price, including the contractor's profit, for supplying and erecting such steel would be $92,312 (Lyall's testimony, Rec. 176), and this without giving any deduction whatever for the cost of the reinforced concrete construction provided for in his original contract.

Horwood says (Rec. 185), that all the steel contracts were padded at the request of Simpson and Kelly, and that there never was any intention on his part as an architect to make any deductions in respect to the additional contracts when the final estimates were being put through on the original contract; and that if he had done so the deductions might in some cases have amounted to more than the extra payments made.

On the 20th day of July, 1914, another contract for $215,000 was made to cover the extra expense for caisson grillage, grillage beams and concrete. Under that contract Kelly received $182,750, being the contract price less 15 per cent, on the assumption, representation and statement that the contract had been performed in full (McTavish Exhibits 16 and 17, Rec. 215 and 216; Priestman Exhibits 14 and 19, $25,500 being included in the latter check). Kelly paid $32,842 for this grillage steel, and it was worth 60 cents a ton to deliver, there being 656 tons (Rec. 172). As a matter of fact there was no grillage required for this building (Rec. 189), and the steel plans prepared in the office of the provincial architect showed about 350 tons of waste steel, as columns and beams built in heavy brick walls (Rec. 189).

Horwood says in making up the estimate for the south wing, for example, that he included an item of 20 per cent for rivets in order to make up the amount which had been agreed upon. Dr. Montague afterwards told him it was impossible to justify it, and Kelly had suggested that more steel should be added on the plans forming part of the contract (Rec. 185). No deduction was made on this contract on account of the original construction and none intended. The money obtained by Kelly on this contract was all wrongfully and fraudulently obtained.

There is also a considerable amount of evidence in this record regarding another contract for $802,650 for steel work in the south wing, central portion and dome. The original plans and specifications provided for this superstructure to be reinforced concrete, and this was to be the cost of the change to steel construction. That contract was made early in July, 1914. There was no occasion for any contract at that time, as the dome could not be constructed for two years (Rec. 184).

Afterwards Kelly's associates in the fraud became panic stricken and undertook to destroy the evidence of this contract, and supposed they had destroyed all records and evidence of there being such a contract in existence. They, however, overlooked one of the outstanding copies, and it was left intact. With reference to there being such a contract, and the attempt to destroy all evidence regarding it, see testimony of Dancer, Rec. 164; Winters, Rec. 166; Wilson, Rec. 186; MacLean, Rec. 187 and 188; Horwood, Rec. 184.

No money was obtained under that contract inasmuch as the expose' occurred prior to the time it materialized.

Summarizing the amounts for *extras,* therefore, we have $779,987 extra cost for change in the foundations, $230,100 for extra cost for steel in the north wing, $215,000 for cost because of grillage steel for the south wing and central portion, and then the parties to round out the matter proposed an extra charge of $802,750 to make the change from reinforced concrete construction in the south wing and central portion above the grillage and the dome; these four amounts aggregating $2,027,737, all being on account of extra work on the contract for $2,859,750 for *two* changes from *concrete piling* to *caissons* for the foundations, and from *reinforced concrete* to *steel construction* for the *superstructure,* which two changes Mr. Schioler says should have been made not only without expense to the government, but at a reduction of $14,492.32 (Rec. 189).

Kelly's firm actually obtained public moneys on account of these transactions for the caissons $779,987, on account of the $230,100 contract $195,585, on account of the $215,000 contract $182,750, or a total of $1,158,322 on account of these *extras* exclusive of other extras and what he received for work done by him under his original contract, without any deduction being made on account of the original contract price.

The Legislative Assembly of Manitoba met on the 9th of February, 1915 (Rec. 50). At that session of the legislature inquiries were made of the proper officials regarding the construction of the new par-

liament buildings and all matters concerned therewith, and orders were made by the House for returns by such officials, showing what had been done regarding those matters (Rec. 57 and 58). The usual select standing committees were appointed by that legislature, including the committee on public accounts (Rec. 52 and 68), whose duty it was to examine and inquire into the public accounts of the province for the year preceding (Rec. 90).

That committee met and began to investigate the payments made to Thomas Kelly & Sons on the building contracts (Rec. 181). Among others, Kelly was called before that committee on the 26th day of March, 1915, and testified, the evidence shows, falsely, regarding the composition of the concrete in the caissons (Rec. 94 and 95).

Horwood, the architect, was also examined before that committee and questioned about the payment for the caissons (Rec. 181). It seems the books with reference to the caissons had been kept by one William Salt, and for the purpose of endeavoring to justify themselves, Horwood and Coldwell first endeavored to get Salt to make a new book, and afterwards to change the figures in his original book, and then finally when he refused to do either of these, bribed him to take a vacation and leave the jurisdiction. Salt left. The legislature prorogued on the 1st day of April, 1915, the House being assured by Premier Rodmond Roblin that a royal commission would be appointed to investigate the parliament building contracts, the opposition in the House having petitioned the lieutenant governor to appoint such a commission (Rec. 182). Such a com-

mission was afterwards appointed by the Lieutenant Governor and investigated the matters in question at great length. Salt was bribed to stay out of Manitoba not only during the session of the Legislative Assembly, but afterwards while the Royal Commission was investigating. (See testimony of Salt, Rec. 175 and 176; Whitla, Rec. 165 and 166; Horwood, Rec. 181 to 183.)

The evidence clearly tends to show that the premier, Sir Rodmond Roblin, the minister of public works, G. R. Coldwell, and subsequently Dr. Montague, the architect, Victor R. Horwood, and subsequently the Attorney General, Howden, and Elliott, chief inspector, were all in collusion with Thomas Kelly & Sons to wrongfully obtain public moneys, and that Dr. Simpson was the political clearing house (Rec. 181).

Prosecutions were commenced against these parties in Canada, but Kelly had left the jurisdiction and was afterwards found in the United States; hence this proceeding.

(The opinion of the commissioner before whom the cause was heard is found in the record at pages 276 to 286). (For the information of the court we also attach to this brief a copy of the opinion of the learned judge who heard the case in the court below, delivered orally from the bench in deciding the case.)

ARGUMENT.

Before taking up for discussion the several questions urged upon the court by the learned counsel for appellant as grounds for the appellant's release from custody, we desire to call attention to some well settled general propositions applicable to cases of this character:

I.

THE TREATY.

An extradition case like this involves the question of the performance of a contract—a treaty between two nations.

By article X of the Webster-Ashburton Treaty of 1842, with Great Britain, it is provided:

> "It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectfully made, *deliver up to justice all persons* who, being *charged* with the crime of murder, or, assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other; *provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there*

been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, *it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.* The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and received the fugitive." (Italics ours.)

U. S. Statutes at Large, Vol. 8, p. 576.

On July 12, 1889, a supplementary treaty, known as the Blaine-Pauncefote Treaty, was made between the United States and Great Britain, by article 1, of which, the provisions of article X of the Webster-Ashburton aforesaid, were made applicable to the following additional crimes:

1. Manslaughter, when voluntary.

2. Counterfeiting, or uttering counterfeit money.

3. *Embezzlement, larceny: receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.*

4. Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

5. *Perjury, or subornation of perjury.*

6. Rape: abduction; child-stealing; kidnapping.

7. Burglary; house-breaking or shop-breaking.

8. Piracy by the law of nations.

9. Revolt or conspiracy to revolt on board ships on the high seas, etc.

10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

The article then provides:

> "Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries."
>
> U. S. Statutes at Large, Vol. 26, p. 1508.

On December 13, 1900, a supplementary treaty was entered into, extending the provisions of the convention of July 12, 1889, to three additional crimes, viz.:

11. *Obtaining money, valuable securities or other property by false pretenses.*

12. Wilful and unlawful destruction or obstruction of railroads which endangers human life.

13. Procuring abortion.

U. S. Statutes at Large, Vol. 32, Part 2, p. 1864.

These treaties include the crimes of which appellant Kelly is charged.

A treaty of this character is executory, and the duty to perform the contract by the government when properly invoked is imposed upon the *execu-*

tive, and not the *judicial* department of the government.

Mr. Chief Justice Fuller, in delivering the opinion of this court in *Terlinden* v. *Ames,* 184 U. S. 270-288, said:

> "Treaties of extradition are executory in their character, and fall within the rule laid down by Mr. Chief Justice Marshall in *Foster* v. *Neilson,* 2 Pet. 253, 314, thus: 'Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department.'"

The terms of the treaties in question import a contract by which each party engages to *deliver up to justice persons charged with crimes* specified in the jurisdiction of the other party. Congress has by appropriate legislation provided the method of procedure to be followed by the executive department of the government in performing and executing obligations imposed upon the government by the treaty.

U. S. Revised Statutes, Sec. 5270.

Section 5270 contemplates:

(a) A complaint under oath to a duly authorized magistrate, charging the person sought with having committed within the jurisdiction of the demanding government some one or more of the crimes provided by the treaty.

(b) The issue of a warrant and the apprehension of the person charged, and bringing him before the magistrate to hear evidence of criminality.

(c) If upon the hearing he deems the evidence sufficient "to sustain the charge under the provisions of the proper treaty, or convention, he shall certify the same, together with a copy of all the testimony taken before him to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulation under such treaty or convention."

The certificate of the magistrate with a copy of all the evidence before him goes to the state department to be passed upon by that department, and it is the duty of that department to determine the duty of the government with reference to the performance of the contract.

If, therefore, the commissioner had jurisdiction, and the proceedings before him and the Secretary of State, were regularly and constitutionally taken under the acts of congress, the judicial department of the government will not interfere by writs of *habeas corpus.*

As Mr. Chief Justice Fuller said in the case of *Terlinden* v. *Ames,* at page 290:

> "The decisions of the executive department in matters of extradition, within its own sphere, and in accordance with the constitution, are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of congress, are pending, they cannot be put an end to by writs of habeas corpus."

II.

HABEAS CORPUS AS APPLIED TO EXTRADITION PROCEEDINGS.

The sole office of a writ of *habeas corpus* is to determine whether the prisoner is lawfully detained in custody. As said by Mr. Justice Gray, in the case of *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 662:

> "A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

In this proceeding Thomas Kelly must either be released from custody or held for extradition. If the Canadian government is entitled under the treaty to the extradition of Thomas Kelly on *any one* of the charges, it necessarily follows that under the terms of the treaty he must be surrendered. The settled rule of this court in extradition proceedings is, that if the committing magistrate has *jurisdiction* of the *subject-matter* and of *the accused,* and the *offense charged* is within the terms of the *treaty* of extradition, and the magistrate in arriving at a decision to hold the accused has before him *competent legal evidence* on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus.*

Terlinden v. *Ames,* 184 U. S. 270, 278.

Ornelas v. *Ruiz,* 161 U. S. 502, 508.
Bryant v. *United States,* 167 U. S. 104.
Yordi v. *Nolte,* 215 U. S. 227.
Nishimura Ekiu v. *United States,* 142 U. S. 651, 652.
McNamara v. *Henkel,* 226 U. S. 520.
Grin v. *Shine,* 187 U. S. 181.
Ex parte Yarbrough, 110 U. S. 651, 653.

Mr. Justice Brown said in delivering the opinion of this court in *Bryant* v. *United States,* 167 U. S. 104:

> "The question before the commissioner in this case was whether, in the language of the Treaty of 1842, article X, 8 Stat. 572, 576, there was 'such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed.' In other words, whether, according to our laws, there was probable cause to believe him guilty of the crimes charged. Rev. Stat. Sec. 5270; *Benson* v. *McMahon,* 127 U. S. 457, 462. The question before us is even narrower than that, viz: Whether there was *any legal evidence* at all upon which the commissioner could decide that there was evidence *sufficient* to justify his commitment for extradition; or, as stated in *Ornelas* v. *Ruiz,* 161 U. S. 502, 508: 'If the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision

cannot be reviewed on *habeas corpus.*' See, also, *In re Oteiza,* 136 U. S. 330."

Keeping these general features in mind regarding the nature and character of the proceeding in question, and the limit and scope of inquiry under a writ of *habeas corpus,* let us examine the particular questions urged by the learned counsel for appellant as a basis for appellant's release.

III.

AS TO THE JURISDICTION OF THE PERSON OF APPELLANT.

It is contended by the learned counsel for appellant that United States Commissioner Mason never obtained lawful jurisdiction of the person of Kelly under the complaint and warrant in this cause, because he had been previously illegally arrested and held until the warrant in this proceeding was issued and served.

The theory is that because the original arrest of Kelly was illegal, and his unlawful detention was continued into and merged in the detention under the warrant in this cause without his being discharged from the illegal detention, that it taints the present warrant with the same illegality. The theory leads to this, that Kelly being in custody under an illegal warrant must be discharged and given an opportunity to escape before he can be arrested, or detained under a lawful warrant, and that if he is not given such opportunity, the magistrate obtains no jurisdiction of his person.

In the first place, it is *not conceded* that the arrest by Lieutenant Larkin was unlawful or unwar-

ranted, or that the detention of Kelly under the warrant issued by the commissioner on the complaint of the Vice-Consul was illegal or void.

Those proceedings were perfectly legitimate to apprehend a *fugitive from justice.* It must be remembered that Kelly is not a citizen of the United States, and does not have all the privileges of one. He is an *alien,* charged with being a *fugitive from the justice of his own country,* and had the authorized officials of the government known of the charges against him, he would not have been permitted to enter this country.

McRae, who sent the telegram (Rec. 241), to the chief of police of Chicago, requesting him to hold Kelly for extradition proceedings, was commissioner of police of Manitoba, and then had in his possession warrants issued by the Canadian magistrate for the apprehension of Kelly for the crimes charged (Rec. 34). The next morning after his arrest by the Chicago police, he was turned over to the United States marshal upon a warrant issued by United States Commissioner M[illegible]on, upon the complaint of the British Vice-Consul (Rec. 21, 295). Certainly, the warrant issued by the commissioner on the complaint of the Vice-Consul was *not void* and without warrant of law, even though hurriedly and inartistically drawn, and based upon such information as the vice-consul then had. It was sufficient to give the commissioner jurisdiction to issue the warrant.

Chief Justice Fuller, in delivering the opinion of this court in *Yordi* v. *Nolte,* 215 U. S. 227, said at page 230, quoting from the opinion of Judge Coxe:

"The general doctrine in respect of extradiction complaints is well settled by Judge Coxe in *Ex parte Sternaman*, 77 Fed. Rep. 595, 597, as follows: 'The complaint should set forth clearly and briefly the offense charged. It need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused person of the precise nature of the charge against him it is sufficient. The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a correct decision upon the main question — is there reasonable cause to believe that a crime has been committed? The complaint may, in some instances, be upon information and belief. The exigencies may be such that the criminal may escape punishment unless he is promptly apprehended by the representatives of the country whose law he has violated. From the very nature of the case it may often happen that such representative can have no personal knowledge of the crime. If the offense be one of the treaty crimes, and if it be stated clearly and explicitly so that the accused knows exactly what the charge is, the complaint is sufficient to authorize the commissioner to act. (Citing a large number of cases.)"

But *assuming* for the sake of the argument that his arrest and detention up to the time of the issuing of the warrant on the complaint, on October 15, 1915, upon which the present proceedings are based were unlawful and would have entitled him to discharge upon a writ of *habeas corpus*, what possible bearing has that fact upon the question as to whether he is *now* lawfully restrained of his liberty?

Since that time a hearing has been had before a magistrate authorized to conduct such a hearing,

and *on evidence* submitted *he has been judicially determined to be a fugitive from the justice of his country,* and that the crimes which he has committed are within the treaties of extradition which compel this government to surrender him to the Canadian authorities, and he is now detained and imprisoned to await the action of the Secretary of State. The question here in this proceeding is whether he is legally restrained of his liberty *now*. *How* the marshal obtained possession of his person, and *how* the commissioner obtained jurisdiction of his person is absolutely immaterial. The commissioner *did* have the appellant before him, heard the evidence and arguments of counsel, duly considered them, and rendered his decision thereon and certified the same with the evidence, to the Secretary of State, and at the same time issued a mittimus, under which appellant was held pending the action of the Secretary of State. (Opinion of commissioner, Rec. 276 to 286; mittimus, 287 to 289; certificate to secretary of state, Rec. 30, 31.)

The practice followed in this case of dismissing a *provisional* complaint and warrant when documents and depositions giving the details had arrived, so that a more definite and specific complaint could be made, was the same procedure as was followed in the case of *Wright* v. *Henkle,* 190 U. S. 40. Wright was sought by Great Britain for committing frauds as a director of a company in the City of London, and a warrant was issued for his apprehension upon a complaint signed by His Britannic Majesty's Consul General at New York, which alleged that his information and belief were based upon messages re-

ceived by cable from His Majesty's Secretary of State for Foreign Affairs. Wright sued out a writ of *habeas corpus* in which he claimed that no facts were set forth showing that petitioner had been guilty of any offense, that he had objected to the continuance of the proceedings but had been overruled and proceedings adjourned until March 30th. In his petition he prayed for writs of *habeas corpus* and *certiorari* and claimed that he was deprived of his liberty *without due process of law*. He also sought bail, which was denied. The writs prayed for were granted and after hearing dismissed and the case appealed to this court. On the argument it appeared that on March 31st a *new complaint* had been made which reiterated the original charge with some amplification, and further stated that the deponent's information and belief were based upon a certain copy of a warrant issued by one of His Majesty's justices of the peace for the City of London for the apprehension of said Whitaker Wright for the offense alleged, and a certain copy of the information and complaint and depositions upon which the warrant was granted; that upon this complaint the warrant was issued and the accused arraigned before the commissioner, and it was thereupon stated that the demanding government would *abandon* all further proceedings under the complaint of March 16th.

That was the procedure followed in this case (Rec. 32 and 33).

While it does not appear that this court from its opinion in the *Wright* case discussed this question, it was one of the points made by counsel who argued

the case for the British consul general, and who cited in support of the proposition that the appellant was not entitled to be discharged from custody by reason of the insufficiency of the complaint before the court, a new complaint having been made remedying the defects in the first complaint—

Nishimura Ekiu v. *United States,* 142 U. S. 651.

Iasigi v. *Van De Carr,* 166 U. S. 391.

and that the arrest on the second warrant was not illegal.

In re McDonald, 11 Blatch. 170.

In the *Nishimura Ekiu* v. *United States* case, the court said:

> "If sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

In *Iasigi* v. *Van De Carr,* 166 U. S. 391, a petition for writ of *habeas corpus* was filed on the 18th day of February to procure the release of Iasigi, who was *charged* in New York with being a *fugitive* from the justice of the State of Massachusetts, the petition averring that he was the consul general of the Sultan of Turkey and that only the federal courts had jurisdiction. A hearing was not had until the 12th of March when the petition was dismissed and petitioner appealed. On the argument in the Supreme Court it appeared from the communication from the assistant secretary of state, under date of March 19th, that Iasigi had been removed from his consular office on the 9th of March, so that at the *time* when the order *remanding* Iasigi to custody

was entered he was not holding a consular office. MR. CHIEF JUSTICE FULLER, speaking for this court, said:

> "As under section 761 of the Revised Statutes it is the duty of the court, justice or judge granting the writ, on hearing, 'to dispose of the party as law and justice require,' the question at once arises whether the order of the District Court dismissing the writ should be reversed, and petitioner absolutely discharged, because the objection existed when the writ issued, although it did not when the order was entered, even if such an objection were ever tenable, which we do not intend in the slightest degree to intimate it could be. If the application for the writ had been made on the 12th of March, it could not have been awarded, on the ground alleged in this petition, and as, on that day, the petitioner could not have been discharged on that ground, in accordance with the principles of law and justice, we are unable to hold that the order of the District Court was erroneous."

In *Kelly* v. *Thomas*, 81 Mass. 192, a prisoner in the custody of the sheriff who sued out a writ of *habeas corpus* on the ground of the insufficiency of the warrant on which he was committed, was remanded because, prior to the hearing, the sheriff had received an *amended* and *sufficient warrant* of commitment upon the same sentence and thereupon asked and obtained leave to amend his return accordingly.

In *Pettibone* v. *Nichols*, 203 U. S. 192, the question was whether the petitioner was entitled to be discharged because he was taken from Colorado to Idaho to be there tried on a charge of murder by reason of a conspiracy between the officials of the

two states to get him out of Colorado without giving him an opportunity to contest the charge that he was a fugitive from justice. The court held, as it did in *Mahon* v. *Justice*, 127 U. S. 712, and *Ker* v. *Illinois*, 119 U. S. 437, that it was immaterial how he came within the jurisdiction of the court.

For similar reasons we submit that it was absolutely immaterial how Kelly came within the jurisdiction of the commissioner, and that his arrest and detention prior to his apprehension under the warrant of October 15, 1915, whether legal or illegal, is absolutely immaterial in this proceeding.

IV.

AS TO THE PERJURY CHARGED NOT BEING THE TREATY CRIME OF PERJURY.

It is contended by the learned counsel for appellant that the extraditable crime of perjury mentioned in the treaty is not charged or shown by the evidence.

(a) Because it is thought that the Canadian Criminal Code defining perjury is broader than the Illinois or the Federal statutes, and makes that perjury which is not perjury by the Illinois or Federal statutes, or by the common law or statutes of Great Britain.

(b) Because it is asserted that there is nothing in the record showing that the subject matter of the inquiry before the *public accounts committee* was properly before that committee so as to give it the necessary authority to examine Kelly under oath.

From which, counsel deduce the conclusion that under the treaty in question there can be *no extradition* from the United States to Canada *for the crime of perjury.* And therefore, he draws the further conclusion that appellant should be released notwithstanding Canada is entitled to have extradition on the other two charges.

The argument is unsound, and his deductions untenable for several reasons:

(a) *As to the Canadian Criminal Code.*

1st. The question before this court does not depend upon whether Canada has enlarged the definition of perjury so as to make that perjury which is not perjury here, but whether the *particular perjury* charged and shown by this record comes within the terms of the treaty.

If this *particular perjury* upon which appellant is sought to be extradited comes within the terms of the treaty, it is not material that Canada by her Criminal Code includes other false oaths under the name of perjury.

The treaty provides that surrender shall be made only "upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial if the crime or offense had there been committed."

Is the complaint and evidence in this record sufficient to show that there is probable cause to believe Kelly guilty of the crime of *perjury,* and sufficient for an *examining magistrate* to commit him for trial if the crime had been committed here? If Kelly had been called before a duly authorized committee of

the General Assembly of Illinois, or a duly authorized committee of the Congress of the United States, charged with the duty of investigating public accounts regarding the construction of a public building of which Kelly was the building contractor and he had testified as he did, would an examining magistrate been warranted in committing him for trial on the charge of perjury?

It is not disputed but that the testimony which he gave was *material* and *intended to deceive the committee, and that it was false.* Those two facts cannot be denied under the evidence in this record. What the Canadian law may be except as it applies to the *particular perjury* here charged, or what the procedure in Canada may be, is not material here in this proceeding. It was not even necessary to show here that any warrant had been issued in Canada for the apprehension of Kelly on the charge of perjury.

In the case of *Grin* v. *Shine,* 187 U. S. 181, this court, speaking through Mr. Justice Brown, said (italics ours):

> "The treaty is undoubtedly obligatory upon both powers, and, if congress should prescribe additional formalities than those required by the treaty, it might become the subject of complaint by the Russian government and of further negotiations. But notwithstanding such treaty, congress has a perfect right to provide for the extradition of criminals in its own way, *with or without a treaty to that effect,* and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro* v. *De Uriarte,* 16 Fed. Rep. 93. This appears to have been the object of Sec. 5270, which is applicable to all foreign

governments with which we have treaties of extradition. The requirements of that section, as already observed, are simply *a complaint under oath, a warrant of arrest evidence of criminality sufficient to sustain the charge under the provisions of the proper treaty or convention, a certificate by the magistrate of such evidence and his conclusions thereon,* to the secretary of state. As no mention is here made of a *warrant of arrest,* or other equivalent document, issued by a foreign magistrate, we do not see the necessity of its production. This is *one* of the requirements of the treaty which congress has intentionally waived. Moore on Extradition, Sec. 70."

All these necessary steps have been taken in this case. The sufficiency of the evidence to establish the criminality of the accused cannot be reviewed upon *habeas corpus.*

Grin v. *Shine,* 187 U. S. 181.
In re Luis Oteiza, 136 U. S. 330.

The only question on habeas corpus is whether there was *any* legal evidence against the prisoner upon which the commissioner was authorized to act.

Bryant v. *United States,* 167 U. S. 104.

In the case of *Benson* v. *McMahon,* 127 U. S. 457, it was contended there *was not any legal evidence of forgery* inasmuch as the alleged forgery was of theatre tickets, which were entirely printed in the name of Mr. Abbey, and there was not found any writing upon them. Mr. Justice Miller, in delivering the opinion of this court, said, at page 463:

"We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in

> an inquiry as to whether, under the construction of the act of congress and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government."

Substitute Great Britain for Mexico, and the language will equally apply here.

After reviewing the evidence, Mr. Justice Miller continued, at page 466:

> "It is for an offense against Mexican law that the prisoner is held to answer. As he is not now upon final trial, but the only question is whether he has committed an offense for which, according to this treaty, he should be extradited to that country and there tried, we do not see that in this application to set the prisoner at large, after he has been once committed by an examining court having competent authority, and after having been held to answer in Mexico for the offense charged, this court is bound to examine with very critical accuracy into the question as to whether or not the act committed by the prisoner is technically a forgery under the common law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed and the final success by which the fraud was perpetrated, are undoubted."

In the case at bar it is for an offense against the Canadian law that the prisoner is held to answer, and the only question here is whether he has committed an offense which, according to this treaty (not the Canadian law), he should be extradited to that country, and there tried. This court has always construed extradition treaties liberally for the

purposes of carrying out the beneficent purposes for which they were entered into.

In *Ornelas* v. *Ruiz,* 161 U. S. 502, this court had under consideration an extradition treaty with Mexico where certain parties were sought for crimes of murder, arson, robbery and kidnapping. Mr. Chief Justice Fuller, in delivering the opinion of the court at page 509, said:

> "Whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law."

The commissioner has found against Kelly, both on the law and on the facts. On the facts there is no doubt but that there is ample legal evidence, and it is *not* shown anywhere that his conclusion is palpably erroneous in law. Certainly not by showing that the Canadian Criminal Code includes this *particular perjury,* and also other false swearing that would not be perjury by the law of this country.

2nd. Even were the Canadian Code *material* in determining the question here, it is not so different from the statutes of the State of Illinois and the United States as to be *material* regarding extradition from the United States to Canada.

The Canadian Code defining perjury is for all practical purposes but an *equivalent* of the Illinois statute and the United States statute regarding per-

jury. For convenience we quote them (italics ours):

Section 170 of the Canadian Criminal Code (Rec. 240) provides:

> "Perjury defined—Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court or by affidavit or otherwise, *and whether such evidence is material or not*, such assertion being known to such witness to be false, *and being intended by him to mislead the court, jury or person holding the proceeding.*"

Section 225 of chapter 38 of the Revised Statutes of Illinois provides:

> "Every person, having taken a lawful oath or made affirmation, in any judicial proceeding, or in any other matter where by law an oath or affirmation is required, who shall swear or affirm wilfully, corruptly and falsely, *in a matter material to the issue or point in question*, or shall suborn any other person to swear or affirm, as aforesaid, shall be deemed guilty of perjury or subornation of perjury (as the case may be), and shall be imprisoned in the penitentiary not less than one year or more than fourteen years."

Section 5392 of the Federal Statutes provides:

> "Every person who, having taken an oath before a competent tribunal, officer or person in any case in which the law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes *any material matter* which he does not

believe to be true, is guilty of perjury and shall be punished by a fine of not more than $2,000 and by imprisonment at hard labor not more than five years," etc.

It will be observed that while the Canadian definition contains the words, "*whether such evidence is material or not,*" it also contains the words, "*being intended by him to mislead the court, jury or person holding the proceeding,*" which the Illinois and United States statutes do not contain.

The statutes of the several states of the Union vary considerably in the definition of perjury:

In 22 *American & English Encyclopedia of Law,* page 684, it is said:

"Under statutes defining perjury or false swearing, the scope of the offense has in most cases been greatly enlarged. Whether a particular false oath constitutes an offense, will of course be determined by the language of the particular statute."

Perjury is defined in *Vol.* 2, *of Wharton's Criminal Law, 9th Ed., Sec.* 1244, as follows:

"Sec. 1244. Perjury, as the offense modified by statute, is now generally defined, is the corrupt assertion of a falsehood under oath or affirmation, and by legal authority for the purpose of influencing the course of law.

"Or, to give a definition drawn from the older common law authorities, it is the wilful assertion as a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court or in an affidavit or otherwise, such assertion being known to such witness to be false, and being intended by him to

> mislead the court, jury or person holding the proceeding. Perjury at common law is a misdemeanor."

This definition is the one cited and approved by *Bouvier* in his *Law Dictionary,* and is also the definition subsequently given by the *English Commissioners* in their draft report of 1879. The author in the foot note cites a number of authorities, both English and American, to support the text.

The real gist of the crime is, the intent to mislead and deceive.

The 7th definition of the word, "material" in the Century Dictionary is as follows:

> "7: In the law of evidence of legal significance in the cause; having such a relation to the question in controversy that it may or ought to have some influence in the determination of the cause."

The language of the Canadian Code, "*being intended to mislead the court, jury or person holding the proceeding,*" is substantially and practically the equivalent of "*materiality*" in the sense with which that term is used in the Illinois and Federal statutes.

For example, in *United States* v. *Landsberg,* 23 Fed. 585, a defendant, under examination before a United States commissioner in New York, charged with counterfeiting, testified that he had not been in prison in that state, or in any other state, when the fact was that he had been imprisoned in the state prison of that state and also in the state prison of New Jersey. He was indicted and convicted of perjury and the question before Wallace, Benedict and

Brown, judges of the Circuit Court of the Southern District of New York, was whether the statement was material. Of course, it can be readily seen that the fact of whether he had been in prison in New York or New Jersey did not, in and of itself, tend to prove or disprove the question of his guilt as a counterfeiter. The court, however, held the statement material within the meaning of section 5392 of the federal statute, inasmuch *as it was calculated to deceive the commissioner.*

Mr. Justice Benedict, in delivering the opinion, said:

> "The rule of the common law in regard to perjury is thus stated by Archbold: 'Every question in cross-examination, which goes to the witness' credit, is material for this purpose.' Arch. Crim. Pl. & Prac. 817 (Eng. Ed.). The same rule was declared by the twelve judges in *Reg.* v. *Givvons,* 9 Cox, C. C. 105.
>
> "The inquiry here, therefore, is whether the imprisonment of the accused in this state and in New Jersey was calculated to injure his character and so to impeach his credit as a witness; for it is not to be doubted that when the accused offered himself as a witness, he placed himself upon the same footing as any other witness, and was liable to be impeached in the same manner. Upon this question our opinion is that the matter stated by the accused as a witness had an obvious bearing upon the character of the witness, and could properly be considered by the commissioner in determining what credit was to be given to the testimony of the witness in respect to the crime with which he stood charged. In *Reg.* v. *Lavey,* 3 Car. & K. 26, the accused, when a witness, had falsely sworn that she had never been tried in the Central Criminal Court, and had never been in custody at the Thames police station. On her trial

for perjury these statements were ruled to be material matter, and the conviction was sustained. In *Com.* v. *Bonner*, 97 Mass. 587, a witness had been asked 'if he had been in the house of correction for any crime.' Objection to the question on the ground that the record was the best evidence was waived, and the case turned upon the materiality of the question. The matter was held to be material. The present case is stronger, for here no objection whatever was interposed to the inquiry, respecting the imprisonment of the accused. Having made no objection to the inquiry, and gained all the advantages to be secured by his false statement, it may perhaps be that it does not lie in his mouth now to say that his statement was not material."

Lord Chief Justice Denman, in *Regina* v. *Overton*, 2 Moody's Crown Cases, 336, 340, said:

"Everything is material that affects the credit of the witness."

In *State* v. *Rosenberg*, 92 Atlantic, 145, Mr. Justice Taylor, in delivering the opinion of the Supreme Court of Vermont, at page 148, said:

"While it is necessary that the false swearing be material, it need not be material to the main issue or question; but it is sufficient if it is material to a collateral inquiry in the course of the proceedings. 2 Bishop's Crim. Law, Sec. 1032; 2 Wharton's Crim. Law, Sec. 1277; Clark's Crim. Law, 334; *State* v. *Keenan*, 8 Rich. (S. C.), 456; *State* v. *Shupe*, 16 Iowa, 36, 85 Am. Dec. 485, and cases cited in note."

"Mr. Chief Justice Holt in *Rex* v. *Greipe*, Holt, 535, says: 'It is perjury to swear falsely in any circumstances which conduceth to the issue, or to the discovery of the truth, though if it be only in some impertinent or minute circumstance.'"

In that case the alleged perjury occurred by the witness testifying *falsely* that he had not been in the court room during the trial since the court had made an order for the exclusion of witnesses; the only effect of which possibly could be that it had a tendency to mislead the court, and thereby perhaps had some bearing upon the question of whether the witness was rendered incompetent as a witness by reason of the violation of the court's order of exclusion.

In *Dilcher* v. *The State,* 39 Ohio State Reports, page 130, at page 134 Mr. Justice Doyle says:

> "It is not necessary that the testimony upon which perjury can be predicated must have the effect, if true, of establishing or deciding the matter in issue. It is sufficient if it has a legitimate bearing on that issue. *If it tends within the rules of law to influence the court or jury in deciding that issue, it is material.*" (Italics ours.)

That which is calculated and intended to "*mislead the court, jury or person holding the proceeding*" is *material* both within the rules of the common law and our own statutes. If the alleged false assertion was intended by the witness making it to "*mislead the court, jury or person holding the proceeding,*" it was necessarily "*material*" within the rule of the common law.

If we apply this principle to the language of the Canadian Criminal Code, it clearly appears that there could be no conviction in Canada under that statute for knowingly making a false statement that is not material within the rule of the common law and our own statutes, and this is true notwithstand-

ing the language, *"whether such evidence is material or not"* contained therein.

3rd. The evidence regarding the *particular perjury* herein charged, shows the *materiality* of the alleged *false* assertions. The *alleged perjury* of Kelly was committed by him while testifying before the Public Accounts Committee—a SELECT STANDING COMMITTEE of the LEGISLATIVE ASSEMBLY of the PROVINCE of MANITOBA. That committee was charged with the duty of examining and inquiring into the public accounts of the Province of Manitoba for the year preceding the appointment of said committee, and also into the matters pertaining to the said public accounts (testimony of Allen, Rec. 90).

Such a committee as the public accounts committee forms an important part of the legislative machinery under the British form of government (Rec. 90). Among the accounts into which this committee were examining were those relating to the construction of the new parliament buildings. These accounts involved large sums of money paid to Kelly. The committee was endeavoring to find out for what the moneys were paid, and whether the contract and specifications had been performed and the province had obtained the character of building that it was paying for.

A great question had arisen regarding the *caissons.* A change had been made in the original specifications from *concrete piling* to *caissons* (Rec. 168, 179), and on account of this change the province had paid Kelly nearly eight hundred thousand dollars. This committee wanted to know what for. The specifications provided that the concrete in

those caissons should be 1, 2 and 4, 1 of cement, 2 of sand, and 4 of broken stone (testimony of Woodman, Rec. 95), and for each cubic yard of concrete so composed it is conceded that it would take at least a barrel and a half of cement.

On March 25, 1915, Kelly was sworn by Mr. E. L. Taylor, the chairman of the committee (Rec. 94), and on the 26th day of March, 1915, testified as follows:

> "Q. In what proportions were the ingredients in the concrete in the caissons?
>
> A. One, two and four, or one and six. One of cement, two of sand, and four of broken stone.
>
> Q. How much cement does it take with these proportions to make a yard of concrete?
>
> A. A little over a barrel and a half.
>
> Q. How much sand?
>
> A. We make it a habit of figuring on half a yard of sand to a yard of broken stone.
>
> Q. Half a yard of sand—and how much broken stone?
>
> A. A yard.
>
> Q. And a barrel and a half cement?
>
> A. About a barrel and a half.
>
> Q. One and a half barrels of cement, a half a yard of sand and one yard of stone make up a yard of concrete?
>
> A. That is what we have always based on. You may get some authority to say less. They probably take it and measure it in the box."

These answers of Kelly were *false* (Rec. 90, 91, 93), and Kelly knew them to be false (Rec. 95). The proof shows beyond any question that there was not to exceed a *barrel of cement* to a *cubic yard of concrete*, and that the ingredients were in the proportion of *one* of cement to *eight* or *nine* of sand and

gravel; that *no* broken stone was used, but instead sand and pit gravel.

Whatever may be the construction placed upon the Canadian Criminal Code in other cases, and whether the definition there given is or is not broader than the definition of *perjury* at common law and under the statutes of Illinois and the United States, it certainly cannot be denied but that *this evidence* is sufficient to show the *materiality* of the alleged false assertions, and that not only is there some evidence upon which the commissioner made his warrant, but that the evidence is amply sufficient *not only to show probable cause,* but in the absence of other evidence to show *absolute guilt* of appellant. And as the *particular perjury* charged here is the *only perjury* upon which Kelly can be tried in Canada if extradited, we fail to see how it is at all *material* that the Canadian Criminal Code, even if it be held to be broader in its definition than the statutes of Illinois and the United States, is at all *material* here. The Canadian courts would be bound to try Kelly upon the charge on which he is extradited.

For these several reasons we submit to the court that the argument of the learned counsel for appellant based upon the alleged broader definition of perjury by the Canadian Criminal Code than is required here or it may be assumed in the treaty involved, is untenable.

(b) *The alleged defect in the authority of the public accounts committee.*

It is argued by the learned counsel for appellant that because there does not appear in the record

here any *specific order* of the legislative assembly of Manitoba, referring to the public accounts committee, the matter about which Kelly was interrogated, that therefore the public accounts committee was without power or authority to examine him on oath with respect to the matter about which he testified.

REGULARITY OF PUBLIC ACCOUNTS COMMITTEE NOT MATERIAL.

1st. It may well be questioned whether it is incumbent upon the commissioner or the secretary of state in performing their duties under the treaty in question and the act of congress regulating procedure thereunder, to inquire into the regularity of the appointment of the public accounts committee, or into the regularity of the procedure by which that committee was empowered or authorized to investigate the matters in question.

Such an inquiry involves an examination into the constitution of the government of the Province of Manitoba, and its methods of procedure. Kelly is *not on trial* for the crime of perjury. Only sufficient need be shown on a hearing of this character before the commissioner or before the secretary of state to warrant placing Kelly on trial for the crime charged. It ought to be sufficient for the purposes of such a hearing that it appears there was a duly appointed committee of the legislative assembly of Manitoba, *in fact, engaged* in investigating matters regarding the construction of the parliament buildings, resulting in the payment of large sums of money, and that it had authority to administer oaths, particularly where it appears as it does in this record at page 94, that *Kelly appeared before the com-*

mittee and took the oath administered by the chairman of that committee *without objection or protest.*

The Supreme Court of Illinois had an analogous question before it in the case of *Maynard* v. *The People,* 135 Ill. 416, where the question was raised that the *police magistrate* had no jurisdiction of the cause wherein it was alleged the perjury was committed. Mr. Justice Baker, in delivering the opinion of the court, at page 430, said:

> "It does not follow, however, that the further contention of the plaintiff in error, that perjury cannot be assigned for any false testimony given by witnesses upon the hearing of said complaint, on account of the want of jurisdiction in the police magistrate to entertain such nplaint, should prevail. * * *
>
> "We understand the true doctrine to be, that although a tribunal must have jurisdiction of the cause or proceedings before perjury can be committed therein, yet that where the defect renders the proceeding voidable, only, and not absolutely void, and such proceeding is amendable, or where the defect has been waived by the parties, there may be perjury committed. See 2 Bishop on Crim. Law (5th Ed.), Sec. 1028, and authorities cited in notes. So, also, one may, if he will, and under some circumstances, waive even a right which the constitution secures to him. 1 Bishop on Crim. Law, Secs. 842-850; 1 Bishop on Crim. Proc., Secs. 112, 118, *et seq.* In the proceedings here involved, plaintiff in error elected to waive the right to quash the process or dismiss the complaint, and to go to a hearing upon the merits, and introduce testimony. If such conduct left the record destitute of an essential part, it perhaps did not estop him from afterwards taking advantage of the defect in it, in case of a conviction therein; but, *at the same time, it should be considered as a waiver of any right to claim that perjury could not be assigned upon false testimony given by him upon such hearing.*"

So here, if Kelly elected to waive any right which he had to object to the power and authority of the committee or the chairman thereof, to administer an oath, and instead of refusing to be sworn and testify, did submit himself to the jurisdiction of the committee and take the oath administered, it should be considered as a waiver of any right he may have to claim that *perjury* could not be assigned on *false testimony* given by him.

Moreover, the alleged defect was one that might have been easily cured had Kelly raised the question. The public accounts committee was but an *agency* of the Legislative Assembly, and that body then in session could easily have remedied the alleged defect if any remedy was necessary.

In *Greene* v. *People,* 182 Ill. 278, 282, it was objected that a master in chancery had no authority to administer an oath because not properly appointed. The Supreme Court of Illinois, said:

> "We do not think the point is well taken, but if it be conceded, still it is clear that he was acting in the capacity of master in chancery at the time, and therefore his authority to administer the oath, cannot be questioned in this proceeding."

The proceeding was a prosecution for perjury, in which Greene had been convicted and appealed to the Supreme Court on the ground of alleged error.

At least the committee on public accounts of the legislative assembly of Manitoba was a *de facto* committee, engaged in making the investigation in question. Whether it was a *de jure* committee cannot be raised in this proceeding. If it can be raised

anywhere, which we much doubt, it can only be raised when he is placed on trial for the crime charged.

2. *The evidence in the case sufficient to show jurisdiction.*

The record in this case shows (Rec. 52), that on the opening of the legislature a resolution was passed that the select standing committees for this House for the present session be appointed for the following purposes:

* * * * * *

* * * V. On Public Accounts. * * *

* * * * * *

"Which said committees shall severally be empowered to examine and inquire into all such matters and things as may be referred to them by the House and report from time to time their observations and opinions thereon, with power to send for papers and to examine witnesses under oath."

A committee to select standing committees was also ordered (Rec. 52), and later that committee reported, naming the personnel of the several committees, among them the committee on public accounts (Rec. 68), which report was approved.

In the meantime, the House had issued orders upon the proper ministers for returns showing certain proceedings among others with reference to the new parliament buildings (Rec. 56, 57 and 58). Section 34, chapter 112 of an act respecting the legislature of Manitoba (Rec. 84), provides that the Legislative Assembly may at all times *command* and *compel* the attendance before such assembly, or before any committee thereof, of such persons, and

the production of such papers and records as such assembly or committee may deem necessary for any of its proceedings or deliberations, and section 35 provides for the examination of said witnesses upon oath by any select committee to which any private bill or other matter or cause has been referred to by the House and provides the form of oath (Rec. 84).

John Allen, a practicing barrister and attorney for the Province of Manitoba, and deputy attorney general, testified (Rec. 90):

> "The public accounts committee of the legislature assembly of the Province of Manitoba is one of the select standing committees appointed by the legislative assembly of the Province of Manitoba, to examine and inquire into the public accounts of the Province of Manitoba for the year preceding the appointment of said committee, and also into all matters pertaining to the said public accounts."

He further says:

> "Such a committee as the public accounts committee, aforesaid, forms an important part of the legislative machinery under the British form of government."

Having been appointed for the *express purpose* of examining and inquiring into the public accounts for the year preceding its appointment, and being found engaged in performing that duty, and Kelly having appeared before said committee and testified *without objection or protest,* it certainly is a fair deduction from these facts that the chairman of that committee had a right to administer the oath to Kelly, and that that committee had jurisdiction and authority to investigate the matter about which

Kelly was examined and that Kelly may not in this proceeding question its power, or authority.

In passing upon this question the learned judge who heard this case in the court below, said (JUDGE LANDIS' OPINION, p. 67):

> "There is no evidence here, direct evidence, that anything was referred to this committee on public accounts. So the question, and it has got to be met, and got to be met in this proceeding: Is there reason here to believe that Kelly was required to appear before that committee? If nothing had been referred to them, Kelly would not have had to respond, because if nothing had been referred they would have had no authority to require Kelly to respond, because they would have had nothing to inquire into: So that question comes down on this phase of it: Is there reasonable ground to believe, or is probable cause shown, that this thing which Kelly was examined about had been referred to that committee for its attention."

The learned judge then reviews the various proceedings and some of the evidence showing the subject-matter of the inquiry, and then concludes (Opinion, p. 71):

> "On the question of there being no authority shown for this committee to ask these questions, I find that from the fact that the legislature called for these reports of these things and subsequently passed an order appointing these men on the committee to investigate the public accounts of the province, that the Canadian law thereupon gave that committee jurisdiction over public accounts during the preceding year; that that committee thereafter met; that it called Kelly as a witness; that Kelly responded as a witness; that the chairman gave him the oath and he took the oath, and that he testified as a witness to such a state of facts as not only

> authorizes but requires the court to find as exhibiting a situation probably showing that theretofore the Canadian parliament had passed an act referring this question to that committee? Was it material? Of course a mere statement of the facts exhibits plainly the materiality of the questions and the materiality of the answers. The committee was investigating public accounts. One account related to the construction of caissons under a public building. The man who did the work was called before the committee. He was asked what he put into the caissons, and he gave the answer. That is material to the question which that committee was charged with investigating."

We contend that the question is a question of fact upon which the commissioner had sufficient lawful evidence before him to find that the public accounts committee was authorized to examine Kelly on the matter under oath, and

3rd. That Kelly by submitting to the jurisdiction of the committee, and there testifying without *objection or protest*, waived any right that he might otherwise have of contending in this proceeding that he was not lawfully sworn.

IV.

AS TO THE CHARGE OF OBTAINING MONEY BY FALSE PRETENSES.

The argument of the learned counsel for appellant upon this proposition seems to be in effect nothing more nor less than an argument on the weight of the evidence.

It is contended that the evidence does not show probable cause for believing that the crime of ob-

taining money by false pretenses has been committed because, it is argued, no one representing the government of the Province of Manitoba was deceived, and no one representing the government relied upon the alleged false statements.

These are questions of *fact* to be determined from the *evidence,* and questions which this court under the rule many times announced will not inquire into so long as there appears to be any evidence upon which the commissioner may exercise his judgment.

McNamara v. *Henkel,* 226 U. S. 520, and cases cited in that opinion.

"False Pretences" is defined in Bouvier's Law Dictionary, Vol. 1, p. 756, as follows:

> "False representations and statements made with a fraudulent design to obtain 'money, goods, wares and merchandise' with intent to cheat."

Further on, in discussing the question and referring to the fact that the wording of the statutes in the different states vary somewhat, it states:

> "It may be laid down as a general rule of the interpretation of the words 'by any false pretense,' which are in the statutes, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offense within the acts."

The Criminal Code of Canada, Section 404 (Rec. 225), is:

> "False Pretense Definition. — False pretense is a representation either by words or otherwise, of a matter of fact either present or past, which representation is made with a fraudulent intent

to induce the person to whom it is made to act upon such representation."

Section 405, Punishment for Obtaining by False Pretense:

> "Every one is guilty of an indictable offense, and liable to three years imprisonment who, with intent to defraud by any false pretense, either directly or through the medium of a contract obtained by such false pretense obtains anything capable of being stolen, or procures anything capable of being stolen, to be delivered to any person than himself."

Section 406, Obtaining Execution of Valuable Security by False Pretense:

> "Every one is guilty of an indictable offense and liable to three years imprisonment who, with intent to defraud or injure any person by any false pretense, causes or induces any person to execute, make, accept, endorse or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security."

Section 96 of Chapter 38 of the Revised Statutes of Illinois, provides:

> "Whoever, with intent to cheat or defraud another, designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined, etc."

The Supplemental Treaty of December 13, 1900, includes, among the crimes for which extradition is to be had, the following:

"11. Obtaining money, valuable securities or other property by false pretenses."

Kelly is *specifically* charged with having obtained $779,987 of public moneys of the Province of Manitoba with intent to defraud His Majesty the King in the right of the Province of Manitoba (Rec. 40). The charge is specific, and the proof amply sustains the charge.

The false statements and pretenses are contained in McTavish Exhibits 7, 8, 9, 10, 11 and 12 (Rec. 145, 146, 147).

Those *statements* are the *basis* upon which Kelly obtained *public moneys* to the amount of $779,987. These are not the usual "progress estimates" made on a building contract containing definite and specific plans and specifications for the work to be performed. These statements are for *extra work* and *based* upon a *quantum meruit.* Each one of them contains the statement *"To labor and materials supplied for above, as follows."* It is addressed to *"Provincial Government, Department of Public Works,"* and the subject is stated to be *"Caisson Foundation, New Parliament Buildings."*

These statements allege, as a matter of fact, that Kelly & Sons had put in those *caisson foundations* 35,993 cubic yards of *reinforced* concrete; that he had used in constructing the same 1,213,000 feet of lumber, and 797.5 tons of iron rings and bolts, and those statements of fact were *false,* and known by Kelly to be *false,* and made to the government with the *intent* that they should be *relied on as facts,* and accepted as a *basis for payment.*

It is contended that the crime of obtaining money by false pretenses was not committed because the evidence shows that certain of the officials who had to pass upon these applications were in collusion and conspiracy with Kelly, and were not deceived by the statements and did not rely thereon. It will be recollected that the moneys which Kelly obtained were *public moneys,* the title to which was in His Majesty the King, for the use and benefit of the Province of Manitoba.

It is *inconceivable* that because Kelly had assistance in obtaining the public moneys, and that some of the parties assisting him were trusted officials of the government, that it can in any way lessen or change the character of his offense.

The government was *deceived* and *defrauded* by the *false pretense,* if some of its trusted officials were not. His Majesty the King, who held title to the money, *was defrauded,* even if some of his trusted agents assisted in the accomplishment of it. *The foundation and basis of getting the money from the treasury were these false statements of fact which were carried through all the proceedings until the money was paid.*

But not all of the officials having to do with the paying out of this money were in collusion with Kelly. The very *first* person who acted upon these false statements was PETER GORDON MCTAVISH, an accountant in the provincial architect's office, who had charge of applications of this character. He says (Rec. 125):

> "Believing in and acting upon the correctness of these applications I made out certificates

> for signature by the provincial architect certifying that the said firm of Thomas Kelly & Sons were entitled to be paid in respect of said estimates, the amounts set out in said certificates. I did not make out, and I would not have made out, certificates for signature by the provincial architect, until I received from the said firm of Thomas Kelly & Sons applications for payment; and said firm would not have received payments, had they not sent in such applications."

There is no evidence in the record to show that McTavish was in the conspiracy, or was other than an *honest official.* It is true that the provincial architect was in collusion with Kelly, and made his certificates based on these *false* and *fraudulent* statements. The minister of public works, to whom his certificates were addressed, was also in the conspiracy, and in collusion with Kelly, and through his influence orders in council were made for their payment which passed to the auditor and provincial treasurer. There is no evidence in the record to show that the auditor or the provincial treasurer had any connection whatever with the fraud in question.

The question whether the *government was deceived* or did *not* rely upon the *false statements of Kelly* is a question which Kelly cannot raise. There can be no negligence imputed to the government. Even where the defrauded party is an individual, negligence is no defense.

Thomas v. *The People,* 113 Ill. 531-537.
Keys v. *The People,* 197 Ill. 638-641.

In *People* v. *Goodhart,* 248 Ill. 373, the sufficiency of an indictment for attempting to obtain money

from the *London Auto Supply Company, a corporation,* by means of a confidence game was questioned. The point was made that the essential elements of the crime was the act by which the defendant sought to influence or create *confidence* in the mind of another in order that he might swindle such person out of his money or property, and that as a corporation has *no mind* and can only act through its officials or representatives, therefore, where the offense is *obtaining* or *attempting* to *obtain money from a corporation,* the indictment should *name* the *person* or *persons* upon whose mind the defendant was operating in attempting to effect the imposition. The court held no such allegations were necessary. Quoting from the case of *State* v. *Turley,* 142 Mo. 403, the court said:

> "A corporation is 'a body consisting of one or more persons established by law for certain specific purposes, with the capacity of succession (either perpetual or for a limited period) and other special privileges not possessed by individuals yet acting in many respects as an individual.' (4 Am. & Eng. Ency. of Law, 185.) It can only speak and act through its board of directors or agents. Its directors are limited in number by its charter, but it may have any number of agents. No one would contend that representations of the character of those defendant is charged with making, if made in writing and addressed to a corporation, would render it necessary to allege that they were relied upon by some particular director or agent of the corporation, and the same rule applies when such statements and representations are verbal."

If not necessary to allege, not necessary to prove and still less necessity to allege or prove when the moneys of the government are wrongfully obtained.

We respectfully submit that there is no basis for the contention of the learned counsel for appellant that there is *no evidence* upon which the mind of the commissioner could act, showing probable cause to believe that Kelly was guilty of the crime of obtaining money by false pretenses within the statutes of both countries and the treaty.

V.

AS TO THE CHARGE OF EMBEZZLEMENT, LARCENY; RECEIVING MONEY KNOWING IT TO HAVE BEEN EMBEZZLED, STOLEN OR FRAUDULENTLY OBTAINED.

Here again the learned counsel present to this court a *question of fact* and one upon which the commissioner had evidence before him upon which to act.

The *third crime* provided for in the Blaine-Pauncefote Treaty of July 12, 1889, is specified in the following language:

> "3. Embezzlement, larceny; receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen or fraudulently obtained."

The fourth specification provides:

> "4. Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries."

The treaty also provides "extradition is also to take place for *participation* in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries."

The crimes scheduled in the *third* specification of the treaty are merged in *one definition* by the Criminal Code of Canada, under the name of "THEFT."

Section 347 and sub-sections provide (Rec. 224):

"Thefts defined—Theft or stealing is the act of fraudulently and without color of right taking or fraudlently and without color of right converting to the use of any person, anything capable of being stolen, with intent,

(a) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely, of such thing, or of such property or interest; or

(b) to pledge the same or deposit it as security; or

(c) to part with it under a condition as to its return which the person parting with it may be unable to perform; or

(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking and conversion.

"2. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become moveable, with intent to steal it.

"3. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

"4. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting."

Section 359, and sub-section (c) provides:

"Clerks and servants.—Every one is guilty of an indictable offense and liable to fourteen years' imprisonment who,

(c) being employed in the service of His Majesty, or of the Government of Canada, or the government of any province of Canada, or of any municipality, steals anything in his possession by virtue of his employment."

Section 399 provides (Rec. 225):

"Receiving property obtained by any indictable offense.—Every one is guilty of an indictable offense and liable to fourteen years' imprisonment who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada, would have constituted an offense punishable upon indictment, knowing such thing to have been so obtained."

Section 400, Receiving Stolen Property, provides:

"Every one is guilty of an indictable offense and liable to five years' imprisonment who receives or retains in his possession any post letter or post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof is hereby declared to be an indictable offense, knowing the same to have been stolen."

Section 402 provides:

"When Receiving is Complete.—The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or other person, possession of or control over such thing, or aids in concealing or disposing of it."

Section 167 *of Chapter* 38 of the Revised Statutes of Illinois defines larceny as follows:

"Larceny is the felonious stealing, taking and carrying, leading, riding, or driving away

the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another, and from a house in the day time, shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt or any instrument of writing of value to the owner."

Section 74 *of Chapter* 38, Revised Statutes of Illinois, defines "*Embezzlement*" as follows:

"Whoever embezzles or fraudulently converts to his own use, or secretes, with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny."

Section 80 *provides:*

"If any state, county, township, city, town, village, or other officer elected or appointed under the constitution or laws of this state, or any clerk, agent, servant or employe of any such officer, embezzles or fraudulently converts to his own use, or fraudulently takes or secretes with intent so to do, any moneys, bonds, mortgage coupons, bank bills, notes, warrants, orders, funds or securities, books of record, or of accounts, or other property belonging to, or in the possession of the state or such county, township, city, town or village, or in possession of such officer by virtue of his office, he shall be imprisoned in the penitentiary not less than one, nor more than fifteen years."

Section 239, *of Chapter* 38, Revised Statutes of Illinois provides:

"Receiving—Every person who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, shall be imprisoned in the penitentiary not less than one nor more than ten years, etc."

(See also Section 142, Chapter 38, Revised Statutes of Illinois, which makes criminal among other things any *contract* made with *intent to deceive and defraud.*)

It is contended that none of these provisions to the Illinois Statutes are here shown by the evidence to have been violated.

But even if this were true (which we do not by any means admit), the evidence here shows a clear violation of SECTION 5438 and SECTION 5497 of the Revised Statutes of the United States.

SECTION 5438 PROVIDES:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspracy to defraud the Govern-

ment of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor, etc. * * *."

SECTION 5497 PROVIDES:

"Every banker, broker, or other person not an authorized depositary of public moneys, who knowingly receives from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States * * * etc. * * * shall be punished * * *."

The CHARGE is that Kelly *unlawfully received money* belonging to His Majesty the King, in the right of the Province of Manitoba, that had *theretofore been embezzled, stolen or fraudulently obtained* by means of an unlawful Conspiracy entered into between Kelly and certain Provincial officials (Rec. 41).

The evidence sustains the charge. It is clearly shown by the record that Kelly received over a million dollars of the Government moneys as the result of the criminal conspiracy between himself and others.

This charge is directly within the terms of the treaty. That it is a crime in both countries is apparent.

The contention of counsel that there is no evidence showing that any money had been received by Kelly that had been theretofore embezzled, stolen or fraudulently obtained by anybody is without merit.

We infer from the statement that it is the contention of counsel that because Kelly was a *party to the fraud* by which the money was unlawfully obtained, that he does not come within the category of receiving money knowing it to have been embezzled, stolen or fraudulently obtained. If that be counsel's theory, we deny that it is sound.

This case is in its *essential particulars* very like the case of the *United States* v. *Gaynor & Greene*, 146 Fed. 766, with the two governments reversed. Gaynor and Green were charged in a Federal Court in Georgia, with being engaged in a corrupt conspiracy with Captain Oberlin M. Carter, a disbursing officer of the United States, to defraud the government out of large sums of money, and he was surrendered by the Dominion government on the application of the Government of the United States under the very treaty now in question, to be tried for, FIRST, *participation in fraud by an agent or trustee*, SECOND, *participation in embezzlement;* and THIRD, for *receiving money and property, knowing the same to have been fraudulently obtained.*

Gaynor and Greene were indicted by the Federal Grand Jury at Savannah for conspiracy in violating section 5440 of the Revised Statutes and also for offenses under section 5438, and a third indictment for offenses under sections 5497 and 5488. Because the indictments under which Gaynor and Greene were tried were called *conspiracy* indictments, they filed a long plea in abatement under which they contended that they were not being tried for the crimes, or either of them, for which they had been extradited

and therefore that the courts were acting in violation of the treaty.

This contention was overruled, *first*, by SPEER, DISTRICT JUDGE, in sustaining a demurrer to the plea, *United States* v. *Greene et al.*, 146 Fed. 766, in a very exhaustive and convincing opinion; *second* by the decision of the Circuit Court of Appeals for the Fifth Circuit, *Greene et al.* v. *United States*, 154 Fed. 401, in which a second exhaustive opinion is given by SHELBY, CIRCUIT JUDGE, who, among other things said:

> "It is contended by counsel that the extradition is for participation in fraud by an agent or trustee, and that the first and second indictments are for conspiracy. That is true, but it is not the whole truth. The conspiracy charged in the indictment is a conspiracy with an agent to defraud. The acts of the defendants charged as constituting the participation in fraud in the extradition are the same acts charged as a conspiracy to defraud in the indictments. While the extradition and the indictment must be for the same criminal acts, it does not follow that the crime must have the same name in both countries. The same crime often has different names in different countries. If the act in question is criminal in both countries and is within the terms of the treaty, nothing more is required."

THIRD: By this court denying a writ of certiorari, *Greene et al.* v. *United States*, 207 U. S. 956.

In that case *Gaynor* and *Greene* were charged with entering into a conspiracy with an agent of the United States Government to defraud the Government, and that they succeeded in the conspiracy, and

Gaynor and Greene *received moneys* so *fraudlently obtained.*

In this case, Kelly is charged wth having entered into a fraudulent conspiracy with certain Provincial officials of the Province of Manitoba to defraud His Majesty the King, in the right of the Province of Manitoba out of public funds, and that the conspiracy succeded to the extent of Kelly *receiving* as the result more than *a million dollars.*

In conclusion, we contend that the Executive Department is justified in deciding to extradite the appellant under the treaty in question for the charges made, and that the court below decided correctly in discharging the writ of *haebeas corpus* and remanding the petitioner for extradition.

Respectfully submitted,

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Attorneys for Appellees, and the Province of Manitoba.

ORAL OPINION OF JUDGE LANDIS.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

IN THE MATTER OF THE PETITION OF THOMAS KELLY.

Chicago, November 24, 1915; 10 A. M.

DECISION.

Landis, J.

This is an application by the petitioner, Thomas Kelly, for discharge from what he asserts to be the unlawful detention of him by the jailer of Waukegan, Lake county. On the filing of this petition the writ was issued, and with the return there has come into the court the record of a certain hearing had before a United States commissioner of this District in an extradition proceeding, wherein the Canadian authorities sought to take from the United States to the Province of Manitoba in the Dominion of Canada this petitioner to answer a charge of crime. There has also been brought into the record here, after the return by the officer exhibiting his authority for holding Kelly, a certain other record from the commissioner's office. So that the matter before the court is to be determined from a record made up by the petitioner's petition, the return of the officer to

the writ which the court awarded the petitioner, and the other matter brought in after the return by the officer, brought in from the commissioner's court, the pertinent substance of which I shall refer to later.

There is an extradition treaty between the United States and Great Britain containing provision for the return from the territories of one country to the territories of the other country of persons charged with crimes mentioned in the treaty. Without such a treaty, of course, there would be no authority under our system of government for the expulsion of a human being from our territory. Any authority for such an act must be found in a treaty.

The treaty between the United States and Great Britain provides for the extradition of fugitives charged appropriately with the crime of perjury; also for the extradition of fugitives charged appropriately with the crime of obtaining money under false pretense. And then another provision inserted or added to the extradition agreement between the United States and Great Britain by a treaty entered into by Sir Julian Pauncefote and Mr. Blaine in 1889, which also provides for perjury, but the clause I call specific attention to now is the following clause, number 3:

> "Embezzlement, larceny, receiving any money, valuables, securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained."

Now those are the three offenses with which this petitioner, as shown by the return of the officer, was charged in the Province of Manitoba, and extradition for which and each of which is sought by the

Canadian Government in the proceeding resulting in an order from the commissioner in accordance with the Canadian Government's demand, and relief against which the proceeding before me was instituted to obtain.

I shall not go into detail, needless detail, into the facts presented by this record. I say *needless* detail. I shall not refer to these facts any farther than is necessary. They are of such a character that considering the one-sided character of a commissioner's hearing, that is to say, having in mind the fact that it is rather a proceeding from which an accused person is barred as to making a defense is concerned, having these things in mind, and considering the nature of the evidence disclosed, I shall not go into needless detail in referring to the facts. They may all be denied or explained away in a hearing.

It appears from the situation here that in the Province of Manitoba there is a legislature; that that legislature met, and appointed what were known as standing committees; that one of these committees was called The Committee on Public Accounts; that the Committee on Public Accounts under the Manitoba law was charged with the authority and duty of looking into the public accounts of the Province for a year, during the year preceding the appointment of the committee; that that committee met, having been named, in accordance with a resolution which appointed a committee on committees, which committee on committees made its report of the appointment of the members of this select committee; that that committee so named met;

that being in session, this petitioner came before that committee as a witness; that being before the committee as a witness, there was administered to this petitioner by the chairman of this committee, charged by the Manitoba law with looking into the provincial accounts, the oath to tell the truth as a witness, and that thereupon this petitioner was asked certain questions and gave certain answers. Those answers formed the basis of the charge by the Manitoba Government that this petitioner, when he gave those answers, committed the crime of perjury, and the petitioner assails the position of the demanding Government that he be sent back there to respond to that accusation, for two reasons. In the first place, the petitioner says the thing called a select committee was without power to ask him the questions; secondly, passing that point, that the demand of the Canadian Government that the man go back there to answer the charge of perjury should be refused because the Canadian definition of perjury is broader than ours. That is to say, the Canadian statute makes a wilful false statement perjury, even though the false statement be respecting an immaterial thing.

Now as to the first one of these two propositions, namely, that this committee called a Select Committee on public accounts is not shown by this record to have been sitting there in the exercise of power theretofore conferred by its creator. There is nothing in this record directly and specifically setting out one essential link to that authority. It is not here definitely, directly, specifically. The law of Canada provides that these committees which are

appointed at the beginning of the legislative session shall have jurisdiction over such matter as may be referred to them by the legislature.

> "Resolved; That the select standing committees of this House for the present session be appointed for the following purposes—."

Naming one of many, of which the fifth is "on public accounts,"

> "which said committees shall severally be empowered to examine and inquire into all such matters and things as may be referred to them by the House, and to report," etc.

There is no evidence here, direct evidence, that anything was referred to this committee on public accounts, so the question is, and it has got to be met, and it has got to be met in this proceeding: Is there reason here to believe that Kelly was required to appear before that committee? If nothing had been referred to them, Kelly would not have had to respond, because if nothing had been referred they would have had no authority to require Kelly to respond, because they would have had nothing to inquire into. So that question comes down on this phase of it: Is there reasonable ground to believe, or is probable cause shown, that this thing which Kelly was examined about had been referred to that committee for its attention?

Preceding the appointing of this committee, it appears from the Journal of the legislature that a series of orders had been passed by the legislature calling upon various ministers of the Province to send in to the legislature reports covering various activities, among others, the work done by contrac-

tors in connection with parliament buildings at Winnipeg. At least two of those orders were enacted by the legislature. calling for information from that department having such things in charge, subsequent to which the committee on public accounts at a session had Kelly before it as a witness, and on which occasion there was submitted to Mr. Kelly a series of questions respecting a subject-matter which I now will refer to somewhat in detail, as necessary to an understanding of the question primarily of materiality in the answers charged to have been given by Kelly, and alleged by the Canadian Government to have been false.

It appears that prior to the meeting of the legislature and prior to the meeting of this committee there had been certain work done in and about the Manitoba Parliament building. That part of it with which we are concerned particularly here relates to the caisson foundations of the building. It appears that Kelly had been a contractor, his firm had been a contractor in the Province; that they had taken a contract in connection with the parliament building; that in addition to the contract there had been an undertaking by Kelly respecting the construction of caissons, the change of caissons. They were to be constructed of a certain character; they were to be constructed of concrete, reinforced in a way indicated by the understanding between Kelly's firm and the Dominion authorities.

The caissons were constructed, and a time came when there was an inquiry. There were charges by suspicious people that all was not right, and an inquiry set on foot, from which and by which it was

disclosed that witnesses testified to a state of facts, the substance of which was that Kelly's firm did not put into the caissons what they had agreed to put in. They had agreed to put in a concrete composed of a certain amount of cement, a certain amount of sand —a certain part of sand and a certain part of crushed stone, whereas, as the evidence of witnesses subsequently examining the caissons—by that evidence it appeared that there had been a gross disproportion as to these elements—these elements, ingredients, there being a practical absence of crushed stone as testified by some of the witnesses.

Now, the thing that Kelly was asked about, and replies to which questions the Canadian Government here charges him with perjury, was as to what went into the caissons which his firm had constructed and put in the ground.

Going over this printed document, it seems to me that somebody has been very generous in the matter of spending money printing something—I don't see for the life of me what the necessity was of the reprinting of all these pages. I am not blaming anybody; I am just observing—a rather unusual situation. Do you know what page that man's evidence is who sets out Mr. Kelly's testimony? Do you know, Mr. Miller?

Mr. Bulkley: There is an index there in that—

The Court: What is the name of the man who gave that evidence?

Mr. Bulkley: I think it is Killey, isn't it?

The Court: Did Allen give that evidence?

Mr. Bulkley: No, Killey.

Mr. Cobb: I could find it for you if you wish.

Mr. Miller: The stenographer, I think.

The Court: Yes, the stenographer. What was the stenographer's name? Here it is. Kelly was asked this question:

"Q. In what proportion were the ingredients in the concrete in the caissons? A. One, two and four, or one in six; one of cement, two of sand, and four of broken stone.

"Q. How much cement does it take with these proportions to make a yard of concrete?

A. A little over a barrel and a half.

"Q. How much sand? A. We make it a habit of figuring on half a yard of sand and half a yard of stone.

"Q. Half a yard of sand, and how much broken stone? A. A yard.

"Q. And a barrel and a half of cement? A. About a barrel and a half.

"Q. One and a half barrels of cement and a half a yard of sand and one yard of stone make up a yard of concrete?

"A. That is what we have always based on. You may get some authority that says less. They probably take it and measure it in a box.

"Q. How many bags in a barrel of cement? A. Four."

The witness' answer as to the ingredients that went into those caissons the Canadian Government charges are false, and it says they are false because it says an analysis, an examination of the caissons

in the ground shows a total, practically a total absence of crushed stone, at least from many of the caissons, and a gross disproportion in the matter of cement and sand.

On the question of there being no authority shown for this committee to ask these questions, I find that from the fact that the legislature called for these reports of these things and subsequently passed an order appointing these men on the committee to investigate the public accounts of the Province, that the Canadian law thereupon gave that committee jurisdiction over public accounts during the preceding year; that that committee thereafter met; that it called Kelly as a witness; that Kelly responded as a witness; that the chairman gave him the oath and he took the oath, and that he testified as a witness, is such a state of facts as not only authorizes but requires the court to find as exhibiting a situation probably showing that theretofore the Canadian Parliament had passed an act referring this question to that committee? Was it material? Of course a mere statement of the facts exhibits plainly the materiality of the questions and the materiality of the answers. The committee was investigating public accounts. One account related to the construction of caissons under a public building. The man who did the work was called before the committee. He was asked what he put into the caissons, and he gave the answer. That is material to the question which that committee was charged with investigating.

The objection is made that that does not authorize extradition under the perjury charge, however,

because the Canadian definition of perjury is broader than ours. That the Canadian charge of perjury may enter into immaterial matter, that is true. The answer to it is that the subject-matter of the Canadian demand is that kind of perjury that we recognize as perjury, and the mere fact that the Canadian statute has gone farther and made something else perjury, in addition to what we call perjury, does not nullify the Canadian Government's right to have extradition of a fugitive charged with an offense that is covered by the extradition treaty, and that is perjury in both countries. The suggestion that he may be taken back to Canada and convicted of some other perjury, immaterial perjury, immaterial false swearing—of course he may be, but I have got to trust the Canadian courts to obey the law. If they allow this man to be convicted of perjury other than that for which they demand his extradition here, the courts would be violating the law. The rule is that in these matters the courts of the two countries will indulge the presumption, as a sort of a matter of comity, that the courts of the other country will obey the law. So I will pass the perjury charge.

There is a charge in this demand that this man committed the crime of obtaining money by false pretenses, and it is urged that this record presents a situation that forbids his extradition on that charge for a reason which I shall presently point out. The criminal offense of obtaining money by false pretenses, which is covered by the statute, and which is an offense in both countries, I will assume for the purpose of this question to be the obtaining of money by a false pretense, the pretender knowing the fal-

sity, the person paying the money being deceived by the false pretense, paying the money on the faith of the false pretense. Without the false pretense the money would not be paid. I assume that those elements are essential to that crime.

In this case the petitioner says he should not be extradited under the charge of obtaining money by false pretences, because, he says, nobody was deceived, as shown by the record in this case. Now the record shows—at least tends to show—the record tends to show that the firm of Kelly & Sons, which were putting in the caissons under the government building, made out applications for money to be paid on account from time to time as work progressed. These applications contained somewhat in detail representations as to what work had been done. They would be presented to an official, and that official would approve the application, and then the application thus approved would go to some other official, who would make a voucher, an accountant would make a voucher; then the voucher would go to somebody who would audit it and would O. K. it, and finally it would go to a treasurer who would pay the money or issue his check.

The evidence tends to show that these applications for payment on account in some instances were at least a trifle exaggerated, and that the contractor knew it. As to how much, it is not necessary now to detail. But the evidence tends to show that the contractor knew it, and that the application was O. K.'d and approved and vouchered and audited, and finally that the man got the money.

Now from this record here it appears that although there was a large conspiracy of a criminal character, running from Kelly close to the chief executive, not including him, but getting close to the neighborhood of the lieutenant-governor, including cabinet officers, inspectors, architects, and the proposition is that inasmuch as nobody was fooled by Kelly, the mere fact that he got all this money don't amount to false pretences, as that is known to be and defined to be a crime.

Now there is no doubt about the fact that if Mr. Bulkley goes to Mr. Miller and presents a statement of services rendered by Bulkley, which statement is false, and Mr. Miller, looking at the statement, believing the assertion to be true, it being a claim against Mr. Miller for money for services rendered by Bulkley, and Mr. Miller believing the statement to be true, the services to be rendered as detailed, pays the money to Bulkley, there is an ideal case of obtaining money by false pretences.

But suppose that Mr. Miller and Mr. Bulkley and Mr. More and Mr. Dickinson, and these gentlemen about here, are all officials of a corporation, one of them is the first man that would have to do with a person demanding money from the corporation, and another one is the last man, that has the last say as to the payment of money from the treasurer of the corporation, and the others hold intermediate positions of trust and confidence under the authority and law of the organization of the corporation, they inspect and audit and check and voucher and inquire as to the legitimacy and validity of demands against the corporation for the payment of money.

Now suppose all these gentlemen get into a scheme to get into the hands of somebody the money of the corporation whose agents they are, and as a matter of fact no agent charged with taking a step in the auditing and checking and paying out of the money of the corporation is deceived, the fact remains the corporation itself is deceived; the entity whose money is taken is deceived. It cannot be otherwise in my judgment. Or as in this case all the officers of this province were corrupt, everybody was a thief, as claimed here. The mere fact that the conspiracy succeeded in reaching those high in authority, those who would sign the check that would give the man the money, that nobody acted on the faith of the truthfulness of the representations—it cannot be that the mere universality of the criminal conspiracy is a defense to the charge of obtaining money by false pretences. The province whose money was taken was deceived. At least, that is my opinion; I may be wrong about it. There is much record evidence. I have erred before. But it appears that in this particular matter everybody was not deceived.

I feel it to be my duty to rescue from this mass of corruption here an accountant who testifies that these applications came to him; that as an essential to the ultimate payment of the money represented to be due by these applications this accountant had to act. He was an obscure subordinate, apparently not in a situation to entitle him to be considered in the conspiracy. But he testifies that these applications came to him, they would be accompanied by a letter from the firm asking payment of the amount

specified in the estimate or application on account of material supplied and work done in respect to the new parliament buildings, and asking that the estimate be put through. Most of these were signed by Lawrence C. Kelly on behalf of the firm. "Believing and acting on the correctness of these applications, I made out certificates for signature by the provincial architect, certifying that Kelly & Sons were entitled to be paid the amount set out in these certificates. I did not make out, and I would not have made out, certificates for signature by the architect until I received from Kelly & Sons application for payment, and the said firm would not have received payments had they not sent in such applications."

Now the achitect was not deceived, as shown by this evidence. The man that signed these things was not deceived. I say he was not—there is evidence tending to show that he was not deceived. But Peter Gordon McTavish was deceived. Under their system Peter Gordon McTavish had to make out these papers to be approved by the architect. And I haven't the slightest doubt that the deception of Peter would fulfill the requirement of the payment of the money on the faith of the truthfulness of the statements, even though before Peter was fooled, architects were corrupted, inspectors stood by and watched the mixture of the concrete as their part of the conspiracy, and after the paper was made out by Peter it was signed by his superior, the architect, who knew it was a dishonest application, audited by a crooked auditor and paid out by a crooked treasurer. The deception [illegible]eter fulfills the re-

quirement of the definition, if it is a requirement, that the money must be paid on the faith of the deception.

Now I come to the last proposition. The charge in the warrant, in the complaint, is embezzlement, larceny, receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained. That is to say, under that clause of the treaty of 1889, this man is also sought to be extradited, in addition to the charge of perjury and obtaining money by false pretenses. There is a dearth of authority, as far as the argument before me was concerned, and as far as my independent examination of it is concerned, on this particuar clause. But in the State of Illinois there is a statute which makes it an offense for a man to receive money which is embezzled by another man. There is a statute which in my opinion makes it an offense for a man to receive money that has been fraudulently obtained to his knowledge by another person from somebody else. "Every person who shall be a party to any fraudulent conveyance of any lands, tenements or heriditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance, had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts," etc., "or who being a party as aforesaid at any time shall wittingly and willingly put in use, avow," etc., "or defend the same or any of them as true, and done, had or made in good faith or upon good consideration, or shall sell or assign, shall be fined $1,000."

That is the only statute I find in Illinois, strange enough, that meets the situation here. But I haven't the slightest doubt that if the evidence disclosed in this record as to what took place there in connection with the getting of this money, was put before a court in support of an indictment appropriately drawn under that section, that the court would be required to refuse to direct a verdict of not guilty.

The Canadian law covers the offense of receiving money obtained by fraud. In Canada it is called a theft. The extradition treaty authorizes the surrender of a person charged with receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen or fraudulently obtained. The good faith that must characterize the treatment of a demand by one Government on another Government for the surrender of a fugitive charged with an extraditable offense would not permit the United States, on the showing of fact made here, if there was no charge of perjury and no charge of obtaining money by false pretenses, to refuse to give up Kelly on that charge, in my opinion, even though Kelly himself was a party to the fraud, the object and purpose and result of which was separating the Canadian Government from its money.

The questions that were suggested as to the authentication to these papers I will not go into. I think they are without merit. The rule which the Supreme Court of the United States has never failed to lay down is that a complaint in an extradition matter is good if it correctly and accurately informs

the alleged fugitive of the charge he is called upon to meet, and if this complaint is fortified by competent evidence, showing reasonable ground to believe him guilty, upon which competent evidence the examining magistrate's mind may act judiciously. That is the rule. The rule as to authentication is, as pointed out here in the argument, a certificate in substance to the effect that the document would be entitled to be received in evidence in the demanding country. The certificate is that in Canada they would be entitled to be received. The objection is that the certificate should be that in Canada they would be received. The certificate is in the language of the statute, and is a substantial compliance with it. The evidence as to the probable guilt of the defendant leaves nothing for a judge to ponder over. It may all be perjury, but unless it is all perjury, there is nothing here in the way of a matter of fact; there is nothing for a judge to give consideration to.

There will be an order dismissing the writ.